Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Illinois, a claimant for unemployment insurance benefits must have earned specified wages during his "base period," which is the first four of the last five completed calendar quarters that precede the filing of a valid claim. The majority of jurisdictions utilize a similar base period.

In order to receive federal certification and funding, a state unemployment insurance program must substantially comply with certain statutory standards of the Social Security Act, including the requirement to have "methods of administration . . . reasonably calculated to insure full payment of [benefits] when due." Federal law, however, does not interfere with a state's eligibility criteria for benefits.

The questions presented are:

1. Is the base period part of the state's monetary eligibility criteria, or is it a method of administration subject to the "when due" clause's requirements?
2. If the base period is a method of administration,
   (a) does the Illinois base period comply with the "when due" clause? and,
   (b) should the court of appeals have reviewed *de novo* this mixed question of law and fact?

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Lynn Q. Doherty, Director of the Illinois Department of Employment Security (successor in office to Loleta Didrickson and Sally Ward, former Directors of the Illinois Department of Employment Security), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment arises from two successive opinions of the court of appeals, namely, *Pennington v. Didrickson* ("*Pennington I*") in 1994, and *Pennington v. Doherty* ("*Pennington II*") in 1997 after remand.

Pennington I

The order of the court of appeals denying rehearing is not officially reported but may be found at 1994 U.S. App. LEXIS 12754 (App. 40). The opinion of the court of appeals is reported at 22 F.3d 1376 (App. 16), *cert. denied*, 573 U.S. 1032 (1994). The final opinion of the district court is not officially reported (App. 69).

Pennington II

The opinion of the court of appeals in *Pennington II* is reported at 100 F.3d 502 (App. 1). The final opinion of the district court on remand is not officially reported (App. 43).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its final judgment on April 4, 1997, in *Pennington II*. (App. 15). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 303(a)(1) of the Social Security Act 42 U.S.C. § 503(a)(1)

§ 503. State laws.

(a) Provisions required.

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . . .

Section 237 of the Illinois Unemployment Insurance Act 820 ILCS 405/237 (1996)

* * * *

For each benefit year beginning on or after November 1, 1981, "base period" means the first four of the last five completed calendar quarters immediately preceding the benefit year.

* * * *

Section 242 of the Illinois Unemployment Insurance Act 820 ILCS 405/242 (1996)

"Benefit year" with respect to any individual means the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits. . . . Any claim for benefits . . . shall be deemed to be a "valid claim" for the purposes of this paragraph if the individual has met the requirements of Section 500E.

Section 500 of the
Illinois Unemployment Insurance Act
820 ILCS 405/500E (1996)

An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that:

* * * *

E. . . . . With respect to any benefit year beginning on or after January 3, 1982, he has been paid during his base period wages for insured work equal to not less than $1,600, provided that he has been paid wages for insured work equal to at least $440 during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest.

STATEMENT OF THE CASE

Introduction

Under the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq.* (1996), consideration for receipt of insurance benefits initially requires that an applicant file a "valid claim," meaning that the threshold monetary eligibility requirements of section 500E of the IUIA have been met. *See* 820 ILCS 405/500E (1996). This section provides that a claimant is only eligible if he was paid, during his "base period," $1,600 in wages for insured work, provided that at least $440 of that minimum amount was paid outside the calendar quarter in which the claimant's wages were highest. *Id.* Section 237 defines the "base period" as the first four of the last five completed calendar quarters preceding the benefit year. 820 ILCS 405/237 (1996). A claimant's benefit year begins to run with the filing of a valid claim. 820 ILCS 405/242 (1996).

Generally, benefits to claimants are funded by contributions or taxes imposed on Illinois employers, based on an employer's taxable wages and amount of benefits paid to former employees. *See generally* 820 ILCS 405/1400, 405/1500-405/1506.4 (1996).[1] A state's unemployment insurance ("UI") program is to receive federal funding for its administrative expenses (42 U.S.C. § 502), if the Secretary of the United States Department of Labor ("USDOL") certifies that the state's laws comply with certain administrative requirements, including 42 U.S.C. § 503.

This action was brought to question whether Illinois' base period requirement is an eligibility criterion left to the state's discretion and, if not, whether it is an administrative method that complies with the Social Security Act. As is shown in the first of Illinois' reasons for granting the writ, most jurisdictions that administer unemployment insurance programs have a similar base period requirement.

Nature of the Action

The jurisdiction of the district court was invoked under 42 U.S.C. § 1983, alleging a violation of federal law.

Plaintiff below, Luella Pennington, individually and on behalf of a certain class of applicants for unemployment insurance benefits, brought this civil rights action against the Director of the Illinois Department of Employment Security ("IDES") in 1985. Pennington was denied UI benefits upon filing her June 1984 claim because she had

[1] In addition to paying contributions, each Illinois employer is required to report the wages paid to employees in each calendar quarter; the wage report is to be filed within thirty days of the end of each quarter. 820 ILCS 405/1400 (1996).

earned no wages during her base period, the four calendar quarters of 1983. (R. Doc. 166 at 8). In October 1984, she was monetarily eligible for UI benefits based on her earnings in the first and second quarters (*id.* at 9), and she did receive benefits for the benefit year beginning October 1984 after filing a second, and this time valid, claim. (*Id.*).

In the district court, Pennington represented a class of claimants who are monetarily ineligible for benefits and who seek eligibility status by including their earnings that fall outside section 237's base period. (*Id.*). The plaintiff class challenged, as violative of the federal law, the Illinois statutory definition of "base period" (*id.* at 2), contending that it delays benefit payments to eligible claimants in violation of the Social Security Act's requirement that a state law include "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation *when due*." 42 U.S.C. § 503(a)(1) (emphasis added).

The Director maintained that the defined base period is a component part of Illinois' eligibility requirements, which federal law fully entrusts to the states. Alternatively, the Director sought to demonstrate that the base period established by Illinois law does not violate the "when due" provision. (R. Doc. 166 at 3).

Proceedings in the Courts Below

Pennington I

During the district court proceedings, the Director of IDES moved to dismiss plaintiff's action and later sought summary judgment, relying in part on the ground that section 237 constitutes a state eligibility requirement. (R.

Doc. 14 & 97). The USDOL, as *amicus curiae*, joined in the Director's summary judgment motion. (R. Doc. 98). The district court denied both motions (and a request to reconsider), believing that the base period was a method of administration subject to the "when due" clause. (R. Doc. 21, 122 & 129).

Following denial of the Director's motions, the parties stipulated to many facts, procedures and issues (R. Doc. 166), and they then went to trial on disputed evidence regarding the feasibility of implementing and utilizing an alternative base period definition. Without resolving the disputed matters, however, the district court entered judgment for the Director, effectively overruling its prior determinations and deciding that the base period was an eligibility requirement. (App. 69-83).

The court of appeals reversed the district court's judgment and held that section 237 is not an eligibility criterion. Rejecting not only the position of the Director, but also the federal government's assertion of "its long-standing view" that issues of base periods are "matters of eligibility and therefore are not subject to the 'when due' clause and, indeed, are within the exclusive responsibility of the states," (App. 29), the Seventh Circuit ruled that section 237 is "an administrative method subject to the strictures of the 'when due' clause of the Social Security Act" (App. 39, 25-37). It remanded the case to the district court for factual findings and a determination whether section 237 complies with the "when due" clause and associated regulations. (App. 37-39).

Pennington II

On remand to the district court, the parties supplemented their evidence from the earlier proceedings with exhibits. For claimants that are monetarily ineligible under

section 237's base period, the plaintiff class proposed two alternatives for implementing a "moveable" or "alternative" base period ("ABP"), which would consider wages earned in the last four completed calendar quarters. (App. 51-54; Pl. Ex. 18). The district court made extensive findings of fact, resolving in IDES' favor the disputed question of the administrative cost to IDES to implement an ABP. (App. 44-60, 64-65).

The district court found that if an ABP were instituted in Illinois: (a) an additional 13,800 to 40,000 claimants (members of the plaintiff class) would be eligible for benefits in a given year; (b) approximately $30 million to $40 million per year in increased benefits would be paid out to claimants; (c) benefits to these claimants would be paid earlier than under the present base period; and (d) the cost to IDES to implement an ABP system would total $13.5 million in one-time conversion costs and $2.6 million in additional annual expenses. (App. 62-65).

Considering these four factors, the district court concluded that the benefits of an ABP to the plaintiff class outweighed the costs to IDES.[2] It therefore ruled that section 237's base period violates the "when due" clause and permanently enjoined its application to the plaintiff class. (App. 65-67).

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[2] At the same time that the district court deemed implementation of an ABP "administratively feasible" for IDES, it found that IDES would have to fund any ABP expense, was experiencing "severe budget constraints," and had decreased its staff from 3,000 to 2,100 between 1990 and 1994. (App. 57-58). Further, the court recognized that the federal government has failed to fully fund IDES' administrative expenses, despite the requirement to do so under 42 U.S.C. § 502, and that funding dropped 25% in "real" dollars between 1984 and 1990. (App. 57).

Applying a deferential standard of review to the mixed question of fact and law (App. 9 & 9 n.7), the court of appeals affirmed the district court's judgment. (App. 14). The court determined that the only inquiry was whether section 237 ensured payment of compensation with the "greatest promptness that is administratively feasible." (App. 10-11 (quoting 20 C.F.R. § 640.3(a)).

In so doing, the court refused to consider IDES' argument that more than one reasonable method of administration is compatible with the "when due" clause. (*Pennington II*, IDES Brief at 31-34, Reply Brief at 4-6). The court did not permit consideration of any other administrative concerns affecting IDES and employers or of the impact on employer contributions, which would justify Illinois' use of section 237's base period and render it reasonable. (*See* App. 13-14).[3]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION IN *PENNINGTON I* JEOPARDIZES THE UNEMPLOYMENT INSURANCE PROGRAMS OF THE VAST MAJORITY OF STATES.

In a case of nationwide first impression, the decision in *Pennington I* addressed a question of exceptional importance and—beyond precedent and contrary to the fed-

[3] Contrary to the court of appeals' implication, IDES did not oppose a "comparative analysis" with an ABP (App. 13); its quarrel was with the narrowness of that comparison. *Pennington I* had also stated that to determine whether section 237 violated the "when due" clause, a court must "weigh the burdens and benefits of section 237 against the burdens and benefits of the plaintiff class's proposed moveable base period." (App. 25). IDES accepted this standard of comparison, but believed it was not employed.

eral administrative interpretation—extended the scope of the federal "when due" clause to Illinois' base period requirement, which measures monetary eligibility for benefits. Now that all of the factual and legal issues have been decided upon the final opinion in *Pennington II*, the petitioner's only judicial recourse is with this Court.

At the present time, 43 other states and jurisdictions use a base period identical to or similar to Illinois' section 237 base period, while eight states have added an ABP.[4] Virtually all of these base periods, including some

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[4] Jurisdictions with Illinois-type base periods include: Ala. Code § 25-4-1 (1992); Alaska Stat. § 23.20.520(3) (1996); Ariz. Rev. Stat. Ann. § 23-605 (1995); Ark. Code Ann. § 11-10-201 (1996); Cal. Unemp. Ins. Code § 1275 (1996); Colo. Rev. Stat. § 8-70-103(2) (Supp. 1996); Del. Code Ann. tit. 19, § 3302(2) (1995); D.C. Code Ann. § 46-101(6) (1996); Fla. Stat. Ann. ch. 443.036(5) (1997); Ga. Code Ann. § 34-8-21 (1992); Haw. Rev. Stat. Ann. § 383-1 (1994); Idaho Code § 72-1306(a) (Supp. 1995); Ind. Stat. Ann. § 22-4-2-12 (1997); Iowa Code Ann. § 96.19(3) (1996); Kan. Stat. Ann. § 44-703(b) (1993); Ky. Rev. Stat. Ann. § 341.090(1) (1995); La. Rev. Stat. Ann. § 23:1472(4) (1985); Md. Code Ann. § 8-101(b) (1996); Minn. Stat. Ann. § 268.04, subd. 2 (Supp. 1997); Miss. Code Ann. § 71-5-11(A) (1995); Mo. Stat. Ann. § 288.030.1(2) (Supp. 1997); Mont. Code Ann. § 39-51-201(2) (1995); Neb. Rev. Stat. § 48-602(1) (1993) (1st 4 of the last 5 quarters permitted and adopted by rule); Nev. Rev. Stat. Ann. § 612.025.1 (1996); N.H. Rev. Stat. Ann. § 282-A2 (1995); N.M. Stat. Ann. § 51-1-42(A) (1996); N.C. Gen. Stat. § 96-8(18) (1996); N.D. Cent. Code § 52-01-01.3 (Supp. 1995); Okla. Stat. Ann. tit. 40, § 1-202 (1986); Or. Rev. Stat. Ann. § 657.010(1) (1989); 43 Pa. Cons. Stat. § 753(a) (1996); P.R. Laws Ann., tit. 29, § 702 (1995); S.C. Code Ann. § 41-27-150 (1986); S.D. Codified Laws Ann. § 61-1-1(2) (1993); Tenn. Code Ann. § 50-7-218 (1991); Tex. Stat. & Codes Ann. tit. 4, § 201.011(1) (1996); Utah Code Ann. § 35-4-201(1) (1994); Va. Code Ann. § 60.2-204 (1992); V.I. Code Ann. tit. 24, § 302(b) (1997); W. Va. Code § 21A-1A-5 (Supp. 1996); Wis. Stat. Ann. § 108.02(4) (1997); Wyo. Stat. Ann. § 27-3-102(a)(i) (1997).

States that have some form of an ABP are: Me. Rev. Stat. Ann. tit. 26, § 1043.3-A (1996); Mass. Ann. Laws ch. 151A, § 1(a) (Supp. 1997); Mich. Com. Laws Ann. § 421.45 (1995); N.J. Rev. Stat. Ann.

(Footnote continued on following page)

ABPs, are subject to judicial challenge as a result of the *Pennington I* decision, causing disruption in the various states' unemployment compensation programs.

Pennington I opens the door in Illinois and almost every other state to further "when due" challenges to state criteria for determining monetary eligibility. Its use as precedent will not be limited to efforts to adopt the alternative sought by the *Pennington* plaintiffs—an ABP of the last four completed calendar quarters for those ineligible under the first four of the last five completed calendar quarters. In California, for example, the plaintiffs in *AFL-CIO v. Bradshaw*, No. C-97-0166 CAL (N.D. Cal.), are relying on *Pennington I* but seek an ABP of the last 52 weeks. Therefore, even those states with an ABP of the last four quarters would be subject to litigation to alter their moveable base periods.

Further, *Pennington I* could be extended beyond the eligibility interests of the plaintiff class. Inasmuch as the base period wages are also used to determine weekly benefit amounts (*see, e.g.*, 820 ILCS 405/401 (1996)), some claimants already eligible under the standard base period would receive higher benefits if their last quarter wages were also considered. (*See* Pl. Ex. 21 at 32-36 (study revealed 40% of such claimants would get higher benefits)).

Rather than relegate state unemployment insurance administrators to future years of uncertainty and costly

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[4] *continued*

§ 43:21-19(c)(1) (1995); Ohio Rev. Code Ann. § 4141.01 (Q) (1996); R.I. Gen. Laws Ann. § 28-42-3(3) (1995); Vt. Stat. Ann. tit. 21, § 1301(17) (1987); Wash. Rev. Code Ann. § 50.04.020 (1990). New York uses a base period of the last 52 weeks. N.Y. Labor Law § 520 (McKinney 1988).

litigation, this Court is urged to grant a writ of certiorari and to review the propriety of a base period requirement as an eligibility standard for unemployment benefits.

II.

WHERE CONGRESS HAS ENTRUSTED UNEMPLOYMENT INSURANCE ELIGIBILITY STANDARDS TO THE INDIVIDUAL STATES, THE SOCIAL SECURITY ACT'S "WHEN DUE" CLAUSE PROVIDES NO BASIS FOR INVALIDATING ILLINOIS' BASE PERIOD.

The *Pennington I* court below concluded that, as matter of law, section 237's definition of Illinois' base period was not an eligibility criterion, but rather was an administrative method and, therefore, subject to the "when due" clause. However, neither the plaintiff class nor the Seventh Circuit disputed that Illinois' requirement of certain earnings during some stated time frame is a legitimate measure of eligibility for UI coverage.

If an earnings requirement is not objectionable as an eligibility criterion, the specific components of that criterion should be recognized as substantive eligibility requirements, rather than methods of administration. The Seventh Circuit's decision represents the first time that the "when due" clause has been extended to reach a component part of the eligibility test itself. This extension blurs the very real distinction between substantive eligibility criteria and administrative methodology, a distinction that is well grounded in law.

A. The Social Security Act's "When Due" Clause Does Not Define Eligibility Criteria.

Section 303(a) of the Social Security Act addresses standards for a state's certification for federal funds and pro-

vides, in relevant part, that a state's "methods of administration . . . [must be] found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). The USDOL has interpreted the "when due" clause to require that the states' UI statutes contain "methods of administration of the law" that assure both the "prompt determination" of eligibility or ineligibility status and the "prompt payment" of benefits "when determined under the State law to be due to claimants." 20 C.F.R. § 640.1(a)(1) & (2) (1996). Generally, regulations require that the methods of administration be reasonably calculated to assure full payment to *"eligible* claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a) (1996) (emphasis added).

While section 303(a) addresses the states' methods of administering their UI laws, it does not reach the threshold eligibility criteria established by UI laws. The Act and the regulations do not govern base periods and other standards of eligibility,[5] since "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(a)(2) (1996). The *Pennington I* court paradoxically dismissed USDOL's long-standing interpretation that base periods are not within its purview, due to the lack of formal regulations on the very subject it deems to be left to the states' discretion.[6] (App. 28-31).

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[5] The federal government has, in fact, expressly adopted state base periods in establishing eligibility requirements for unemployment compensation for federal civilian employees, 20 C.F.R. § 609.3(a) (1996), and for ex-service members, 20 C.F.R. § 614.3(a) (1996).

[6] USDOL apparently still considers base periods to be eligibility standards, rather than methods of administration. *See Unemployment Insurance Issues, Hearings Before the Subcomm. on Human*

(Footnote continued on following page)

None of the previous "when due" clause cases has disturbed the eligibility standards that establish which persons have earned initial coverage under the individual states' insurance programs.[7] In *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), the claimants were found initially eligible for benefits; however, benefits were suspended when their employers took an appeal to raise the disqualification issue of "discharge for cause." 402 U.S. at 123. This Court ruled that the statute violated prompt payment requirements "after an initial determination of eligibility." *Id.* at 133. The *Java* Court deemed payments to be "due" for purposes of section 303(a) at the earliest time administratively feasible after the worker and employer have an opportunity to be heard. *Id.* This Court, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), read *Java* to require the prompt disposition of valid claims submitted to the administrative process for determination. 419 U.S. at 387-88. *See also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3rd Cir. 1980) (unsuccessful challenge to USDOL's regulation on the disposition of second level appeals to Board of Re-

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[6] *continued*

Resources, Comm. on Ways and Means, 104th Cong., 2nd Sess., July 11, 1996, pp. 6-11, 27-34 (testimony of Mr. Uhalde, Deputy Assistant Secy. for USDOL, stating that agency position is unchanged); *see also Pennington I*, App. 38 n.9 (despite court's invitation to the Secretary to promulgate regulations on base periods over three years ago, none adopted).

[7] The court below erroneously construed the Director's argument as one that distinguished prior case law on the basis of whether an initial determination of eligibility had been made by the state agency (App. 34). As will be shown in the following discussion, the distinction made by the Director has been, and continues to be, one between the *procedures* to determine eligibility under a state's criteria and the *provisions* of those eligibility criteria.

view from adverse determination of eligibility, discussing *Fusari*).

However, when the claimant in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), attempted to extend the "when due" clause and *Java* to attack Ohio's decision not to cover workers whose unemployment resulted from a labor dispute, this Court firmly rejected that attempt, stating that "[n]othing in *Java* purported to define the class of persons eligible for benefits." 431 U.S. at 486-87.

Neither the Act, federal regulations, nor case law provides authority to disturb monetary eligibility requirements by applying the "when due" clause to questions of eligibility, rather than to methods of administration. The distinction recognized by this Court in prior decisions was improperly rejected in the present case, injecting uncertainty into the UI programs of virtually all states.

B. A Base Period Is A Component Part Of A State's Monetary Eligibility Requirements, Rather Than A Method Of Administration Subject To "When Due" Requirements.

" 'General [eligibility] rules are essential' " to a state's UI program even though adverse consequences result in some cases. *Ertman v. Fusari*, 442 F. Supp. 1147, 1151 (D. Conn. 1977) (quoting *Califano v. Jobst*, 434 U.S. 47, 53 (1977)). Whenever a state legislature develops its minimal requirements for insurance coverage, some individuals will claim to be adversely affected by the requirements chosen. This inevitability does not, however, mean that a state's eligibility requirements may be discarded by the federal courts in order to award benefits to a claimant for whom benefits could only be "due" under different criteria.

The Social Security Act's legislative history indicates that unemployment insurance was intended for the "ordinarily steadily employed," (Report of the Comm. on Economic Security at 1321-22, quoted in *Java*, 402 U.S. at 130-31) and need not be extended to every unemployed person. *Hodory*, 431 U.S. at 483. The twin components of Illinois' monetary eligibility requirement—the one year base period and the earnings threshold of $1,600 with $440 outside of one quarter—reflect where Illinois has drawn the line to effectuate that intent. Generally, these criteria ensure that benefits are available to those with a genuine ongoing attachment to the labor force.

The fact that the monetary eligibility standards may not operate perfectly in excluding those with a marginal work force connection does not alter their character as eligibility criteria. Under certain circumstances, a person, such as a member of the *Pennington* class, may ultimately qualify for benefits when all of his or her earnings fall within the base period. Illinois could have chosen higher qualifying wages or a different base period, as some states have.[8] Moreover, Illinois could have mandated that wages be earned in three or even four of the quarters of the base period—a tougher requirement with which the plaintiffs apparently would have no legal quarrel.

However, Illinois was not required to adopt any of these alternatives, rather than the standards it selected. Con-

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[8] The existence of an ABP is not the litmus test of fairness to the unemployed. For example, while eight states currently employ a moveable base period at least as broad as that sought by the *Pennington* class, the qualifying wages in those states are effectively higher than that required in Illinois. *See, e.g.*, Mass. Ann. Laws ch. 151A, § 24(a) (Supp. 1997); Ohio Rev. Code Ann. § 4141.01(R) (1996); R.I. Gen. Laws Ann. § 28-44-11(b) (1995); Wash. Rev. Code Ann. § 50.04.030 (1990).

gress recognized the "importance" of the states' interest in establishing their own UI programs "and especially their own eligibility criteria." *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 539 (1979). As each state designs its own insurance program, it is entitled to define the parameters of that program.

Congress wisely left eligibility criteria to the individual states. Eligibility standards necessarily govern how much money in benefits will flow out of the state's Unemployment Trust Fund, which is funded by taxes from the state's employers. 820 ILCS 405/240 and 405/2100 (1994). The method of revising eligibility criteria therefore should be through the state legislative process where policy makers can consider what changes would be necessary on the revenue side to accommodate any proposed revision in eligibility. As demonstrated in *Pennington II* and discussed later, when extending the "when due" clause to base periods, the judiciary's narrow focus fails to account for the significant funding impact that results from altering the criterion to make more claimants eligible.

Congress declined to establish a federal definition of the scope of coverage for UI benefits in the Social Security Act, and that Act's "when due" clause should not be utilized by the courts to impose eligibility requirements on the states. As did all state legislatures, the Illinois General Assembly chose certain criteria to provide a "snapshot" of recent work history to define entitlement to coverage, including the designation of a base period. Because virtually all base period choices of states, including some ABPs, are now subject to legal challenge under the Seventh Circuit's reasoning, this Court should grant *certiorari* to provide state administrators with much needed guidance in ensuring the acceptability of their statutory schemes under federal law.

III.

IF SECTION 237'S BASE PERIOD IS A METHOD OF ADMINISTRATION, IT DOES NOT VIOLATE THE "WHEN DUE" CLAUSE.

When the judiciary assumes the role of judging a state's compliance with the Social Security Act, which Congress has entrusted to USDOL's Secretary, the standard for compliance found in the Act should be applied by courts. That standard permits some flexibility in the state laws that are subject to the "when due" clause. The narrow focus of the court of appeals in *Pennington II* both failed to consider Illinois' concerns and permitted an ABP methodology to simply displace section 237's base period, absent the flexibility that the Act allows.

A. The Illinois Base Period Substantially Complies With The "When Due" Clause.

Section 303(a)(1) of the Social Security Act calls for methods of administration that are "reasonably calculated" to insure full payment of benefits "when due." 42 U.S.C. § 503(a)(1). Congress granted the Secretary of Labor "a great deal of flexibility in determining whether a state's program satisfies the statutory prerequisites to funding," since the program need only "compl[y] substantially," with section 303(a) to be certified. *Wilkinson v. Abrams*, 627 F.2d 650, 660 (3rd Cir. 1980) (citing 42 U.S.C. § 503(b)(2)); *see also* 20 C.F.R. §§ 640.3(b) & 650.3(b) (1996) (interpreting section 303(b)(2) as requiring substantial compliance with section 303(a)).

The Seventh Circuit has agreed with Congress and the Third Circuit, at least in the abstract, in recognizing the "when due" clause's ability to accommodate reasonable methods of administration. *See Pennington I*, App. 31

(within the confines of the "when due" clause, states "have a great deal of latitude" on administrative matters); *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982) ("If Illinois had good reason" to postpone payment, "we would not regard section 303(a)(1) . . . as a bar to postponement" that is reasonable). Even the regulatory standard applied below, which calls for methods that reasonably insure benefit payment and determination with the greatest promptness that is administratively feasible (20 C.F.R. §§ 640.3(a) & 650.3(a) (1996)), accommodates a "variety of . . . procedures" and the "differences in administrative procedures among states." *Wilkinson*, 627 F.2d at 662, 663.

However, in *Pennington II*, the district court's and court of appeals' test of compliance became: if the benefits of an ABP outweigh the cost of its implementation and operation, then section 237 violates the "when due" clause. (App. 12-13; App. 65).[9] By deciding this way, the court suggested that only one system could comply with the Act. If the court had applied the standard entrusted to the Secretary, the Illinois base period, as well as ABPs, could be "compatible with the 'when due' clause" (*Pennington I*, App. 38). *See also Pennington I*, App. 38 n.9 (the court recognized that the Secretary could establish Illinois' base period as acceptable). In fact, the Secretary is still certifying Illinois as being in conformity with the "when due" clause.

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[9] While the court of appeals characterized the parties as "agree[ing]" to weighing an ABP's benefits and costs (App. 12), the district court actually framed this as positions taken by the parties "at least implicitly." (App. 61). IDES, however, had presented substantial evidence beyond these factors (*see* App. 44-60) and argued that additional implications should be considered. (*See* App. 13-14).

The narrow inquiry in *Pennington II* ignored significant considerations that would have demonstrated the base period's reasonableness under the "when due" clause. Primarily, neither court below reconciled its conclusion that the enormous financial expense of implementing and operating an ABP was "administratively feasible" for IDES, which was underfunded, short-staffed, and suffered from severe budget constraints. (App. 57-58). The analysis further failed to consider the administrative and financial impact on employers, even though the *Java* decision took the lack of burden on employers into account. *California Department of Human Resources v. Java*, 402 U.S. 121, 135 & 135 n.19 (in finding California's appeal procedure violative of the Act, this Court found "no hardship on either the State or employer"). An additional factor overlooked was that persons in the *Pennington* class could get *higher* weekly benefits than a claimant now eligible under the existing system, even though the latter earned more wages and worked more quarters. (*Pennington II*, IDES Brief at 41, Reply at 13-15).

Had these and other factors been considered, an assessment of Illinois' base period would not have led to the conclusion that it failed to comply with the "when due" clause. In this area of general importance to all states, but where this Court has seldom spoken, it is imperative that the standard applied by the court below be corrected and that proper guidance be given courts that assume the role of the Secretary of USDOL.

B. A *De Novo* Standard Of Review Applies To This Mixed Question Of Law And Fact.

Mixed questions of law and fact have been described as issues in which:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982). Where the issue falls "between a pristine legal standard and a simple historical fact," this Court has acknowledged that "the fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Thus, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (citing *Miller*, 474 U.S. at 114). However, where "the relevant legal principle can be given meaning only through its application," there is a reluctance to give deference and thereby "strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984)); *see also Ornelas v. United States*, ____ U.S. ____, 116 S. Ct. 1657, 1662 (1996) (holding that *de novo* review of a mixed question of law and fact was warranted so that appellate courts "maintain control of, and [ ] clarify the legal principles," "unify precedent" and prevent varied results).

In the present case, the facts were admitted or established at the district court level and were not challenged by

IDES on appeal. The sole issue was whether the statutory "when due" standard was violated based on the established facts. The court of appeals correctly determined that a mixed question of law and fact was thus presented, but improperly applied a deferential standard of review, rather than a *de novo* standard. (App. 9 & 9 n.7).

The court of appeals' reliance on this Court's decisions in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990), and *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988), for a deferential standard was misplaced. Unlike this case, an abuse of discretion standard was applied in *Cooter* and *Pierce* precisely because the district court was "better positioned" than the reviewing court to make necessary factual determinations. *See Cooter*, 496 U.S. at 401-02 (in review of Rule 11 sanctions, which was compared to a negligence finding, district court must assess credibility and is familiar with the issues and litigants); *Pierce*, 487 U.S. at 559-60, 562 (whether government's position is substantially justified for attorney's fees purposes "may be known only to the district court," which may have "insights not conveyed by the record").

In this case, this Court and the court of appeals, as expositors of the law, are better positioned than the district court to determine what the federal law requires and whether it has been violated. Therefore, this Court is further urged to grant *certiorari* to clarify its precedent on the standard of review for mixed questions of law and fact.

CONCLUSION

For these reasons, the Director of the Illinois Department of Employment Security respectfully asks this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1499

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellee,

v.

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6327—**Paul E. Plunkett**, *Judge*.

ARGUED OCTOBER 23, 1996*—DECIDED APRIL 4, 1997

Before ESCHBACH, RIPPLE and KANNE, *Circuit Judges*.

RIPPLE, *Circuit Judge*. This is a successive appeal. Luella Pennington, the class representative in this § 1983 case, seeks injunctive relief from the operation of one of the provisions of the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq*. In

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* This successive appeal was heard by the original panel pursuant to Operating Procedure 6(b).

Pennington v. Didrickson,[1] 22 F.3d 1376 (7th Cir.) ("*Pennington I*"), *cert. denied*, 115 S. Ct. 613 (1994), we held that Illinois' method of determining a base period, on which entitlement to benefits was calculated, was not an eligibility requirement, but an administrative provision, of the program. Accordingly, we concluded that the provision was subject to the "when due" clause of section 303(a) of the Social Security Act ("SSA"), 42 U.S.C. § 503(a). We therefore remanded the case to the district court to determine whether section 237 of the IUIA, which sets forth the formula by which Illinois calculates the base period, complies with SSA § 303(a) by ensuring the greatest promptness in paying unemployment benefits. *See* 22 F.3d at 1387-88. The district court, after accepting further submissions from the parties, concluded that section 237 violates the "when due" clause of the SSA. For the reasons that follow, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

Because this case is a successive appeal, we shall assume a familiarity with the facts set forth in our previous opinion, *see Pennington I*, 22 F.3d at 1378-81, and limit our rendition here to a repetition of those matters most pertinent to the resolution of this appeal.

The plaintiffs are claimants for unemployment insurance benefits under the IUIA, Illinois' unemployment insurance program. Their claims have been either delayed or denied because of the manner in which the IUIA defines the term "base period." Section 237 of the IUIA

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[1] Lynn Doherty replaced Loleta Didrickson as the Director of the Illinois Department of Employment Security ("IDES").

defines "base period" as "the first four of the last five completed calender quarters immediately preceding the benefit year."[2] 820 ILCS 405/237. For example, for an individual who filed for benefits in June of 1993 (during the second quarter of 1993), the resulting base period under the IUIA would be the four calendar quarters of 1992. *Pennington I*, 22 F.3d at 1378. The first quarter of 1993 would be the lag quarter, and the second quarter of 1993 would be the filing quarter.

In *Pennington I*, we held that the base period was not an eligibility requirement, as the district court had held it to be and as IDES had maintained. Rather, it is an administrative provision subject to the "when due" clause of the SSA. Section 303(a)(1) of the SSA, the "when due" clause, provides that a state's unemployment insurance law must provide for "'such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.'" *Pennington I*, 22 F.3d at 1378 (quoting 42 U.S.C. § 503(a)(1)). The Secretary's regulations amplify this statutory provision: The state must implement "such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Had we accepted Illinois' contention in *Pennington I* that the definition of base period was an eligibility requirement rather than an administrative provision, section 237 would not have been subject to the "when due" clause. *See* 22 F.3d at 1381 & n.4.

Having determined that the designation of a base period was an administrative provision subject to the

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[2] A "benefit year" is the one-year period beginning on the first day of the week in which the individual first files a valid claim for benefits. 820 ILCS 405/242.

"when due" clause, we reversed and remanded the case to the district court to determine, based on the evidence it had and on any further submissions from the parties, "whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue." *Id.* at 1388. To make this determination, we held that it was necessary for the district court "to decide whether section 237's base period strikes a reasonable balance between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (internal quotation and citation omitted).

B. *District Court Remand*

The district court, both in the original proceeding and on remand, had a voluminous record containing evidence and testimony about Illinois' current wage record system and about the plaintiff class' various alternative proposals. Under the current system, section 237 requires an examination of the first four of the five previously completed quarters to determine whether sufficient insured work has been done to award the benefits. These four quarters are the base period under the current system.

The alternatives incorporated other base periods which, in the view of the plaintiffs, fulfilled the statutory mandate. An alternative base period ("ABP") looks to a different set of four quarters to determine whether sufficient income was earned. In the ABPs proposed by Ms. Pennington, for example, the ABP for those who did not meet the income requirements of the section 237 base period would be the four completed quarters preceding a claimant's filing of a claim. Under both of the plaintiff class' alternatives, IDES, in determining the benefits for

a claimant who did not qualify for benefits under the section 237 base period, would look to the lag quarter and the three preceding quarters to determine the claimant's benefits. The primary difference between the two proposed alternatives is that the second alternative incorporates a wage request system for some of the lag-quarter eligible claimants. The parties' submissions on these alternatives included substantial evidence on their likely benefits as well as on the potential costs of implementing them.

The district court, in a thorough and well-reasoned opinion, weighed four factors to determine whether section 237 strikes a "reasonable balance."[3] R.220 at 21. In the court's view, three of these factors weighed in favor of a determination that the current system was not compatible with the "when due" clause of the federal statute. First, the court found that the number of additional claimants who would be eligible under an ABP system represented a significant increase. The evidence indicated that, in a given year, between 13,800 and 40,000 members of the plaintiff class would be eligible for benefits if lag quarter wages were considered. Second, the amount of additional benefits, $30 million to $40 million per year, that IDES would pay out under an ABP system would be a "*dramatic* increase in financial benefits to unemployed persons." *Id.* at 23. Finally, the parties stipu-

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[3] The district court also examined another factor that we had indicated ought to be considered in its determination: whether a change to a different system would increase the number of fraudulent claims. The court determined that this factor ought not play a significant role in its analysis. IDES did not argue on remand that adopting an ABP would necessarily lead to an increase in the number of fraudulent claims. Rather, it contended that certain methods of implementing an ABP carry with them risks of increased fraud. Therefore, the district court did not consider the threat of increased fraud within the system to be a prominent term within its equation.

lated that the adoption of an ABP in Illinois would speed the payment of benefits to those claimants whose benefits are delayed under the present system. The court found that an ABP system results in prompter payments to lag-quarter eligible claimants and to filing-quarter eligible claimants. On average, the ABP would result in a lag-quarter eligible claimant receiving his benefits 45 days earlier than under the current system. In the most extreme cases, a claimant would receive benefits 12 weeks earlier under an ABP than under section 237's base period.

The final factor, the costs to IDES to implement an ABP, favored, in the view of the district court, the position of Illinois that these alternatives were not feasible. In determining these costs, the court relied on IDES' cost estimates. It did so for two reasons. One, it found IDES' evidence on costs more credible. Two, it believed that accepting the highest cost estimates proffered demonstrated most clearly whether the additional benefits gained from moving to an ABP outweigh the costs of that move. IDES had estimated that it would incur a one-time cost of approximately $13.5 million for computer conversion and additional staff. It also estimated that the ABP would cost an additional $2.6 million annually. These expenses would come at a time, according to the district court, when IDES already would face budgetary constraints.

The court concluded that, although the additional costs to IDES would be great, the benefits to the plaintiffs "clearly outweigh the costs to IDES." R.220 at 25. Thus, the court reasoned, "section 237 violates the 'when due' clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible." *Id.* The district court therefore enjoined IDES permanently from applying section 237 to the plaintiff class.

Finally, pursuant to our direction in *Pennington I*, the district court did not adopt as a remedy either of the alternatives suggested by the plaintiff class. The determination of what system ought to be implemented is the prerogative of the State of Illinois. *See* 22 F.3d at 1388.

II

DISCUSSION

A.

1.

Because this is an appeal in a case that we remanded in *Pennington I*, it is governed by the law of the case established in that first appeal. The law of the case doctrine "limits redetermination of rulings made earlier in the same lawsuit." *Rekhi v. Wildwood Indus.*, 61 F.3d 1313, 1317 (7th Cir. 1995) (emphasis omitted) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). Therefore, the matters decided in *Pennington I* become the law of this case to be followed in this appeal "unless there is a plain error of law" in our earlier decision.[4] *Rothner v. City of Chicago*, 929 F.2d 297, 301 (7th Cir. 1991). Although not a straightjacket, *Avitia v. Metropolitan Club*, 49 F.3d 1219, 1227 (7th Cir. 1995),[5] the doctrine is not to be set aside or disregarded

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[4] A panel in a successive appeal may re-examine its previous decision if it has a "strong and reasonable" conviction that its earlier decision was wrong and if the change would not cause undue harm to the party who had previously benefitted from its ruling. *Avitia v. Metropolitan Club*, 49 F.3d 1219, 1227 (7th Cir. 1995) (citing *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

[5] Two further exceptions justify a court's divergence from the law of the case: if the evidence adduced in a second trial is

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lightly. It is "'based on the salutary and sound public policy that litigation should come to an end.'" *Rothner*, 929 F.2d at 301 (quoting *Shakman v. Dunne*, 829 F.2d 1387, 1393 (7th Cir. 1987) (internal quotation and citation omitted), *cert. denied*, 484 U.S. 1065 (1988)). There is no justification to deviate from the law of the case doctrine here.

2.

We turn to the applicable standards of review. We review findings of historical fact by the district court under the clearly erroneous standard. However, there is no real dispute between the parties as to the historical facts of the case. As IDES notes in its brief, the majority of the evidence presented to the district court was undisputed by the parties or was the subject of stipulation. The principal area of factual disagreement, the comparative costs of alternates to the current program, was determined in favor of IDES by the district court. To the extent that the submissions of the parties require us to determine whether the district court, in formulating a methodology for its inquiry, correctly interpreted the mandate of *Pennington I*, the question is one of law, and our review is de novo.[6] Finally, we must evaluate the

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[5] (...continued)
substantially different from that of the first trial and if controlling authority has established a contrary ruling of law. *Rothner*, 929 F.2d at 301 n.6. Neither of these exceptions is applicable to this case.

[6] *See United States v. Townsend*, 73 F.3d 747, 754 (7th Cir. 1996) (stating that "question whether the district court considered the appropriate factors" in reaching a legal conclusion is reviewed de novo); *In re Love*, 957 F.2d 1350, 1359 (7th Cir. 1992) (stating that correctness of district court's methodology
(continued...)

district court's use of that methodology by its application of the facts of the case to the legal standard we enunciated in *Pennington I*. Our review of the district court's assessment of the facts in light of those legal standards is subject to deferential review.[7]

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[6] (...continued)
in assessing facts is a question of law); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991) (stating that de novo review is appropriate in reviewing the district court's methodology); *cf. Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (noting that district court's findings that rest on an erroneous view of the law may be set aside on that basis); *FDIC v. Bierman*, 2 F.3d 1424, 1431 (7th Cir. 1993) (stating that questions of law are reviewed de novo).

[7] *See Cooter & Gel v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990) (stating that mixed question of law and fact should be reviewed for an abuse of discretion); *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988) (same); *Carle Found. Hosp. v. Shalala*, 57 F.3d 597, 599 (7th Cir. 1995) (noting that mixed question of law and fact is reviewed in a deferential manner—"whether the initial decisionmaker is a district court or an administrative agency") (internal citations omitted); *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 382 (7th Cir. 1995) (stating that mixed questions of law and fact set aside on appeal only if clearly erroneous); *Bierman*, 2 F.3d at 1432 (noting that the clearly erroneous standard is well established in this circuit's appellate review of mixed questions). *But cf. In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996) (noting the possible effect of *Ornelas v. United States*, 116 S. Ct. 1657, 1662-63 (1996), on some mixed questions beyond the Fourth Amendment context). We note further that after *Ornelas* the preferable term for the standard of review of mixed questions in these contexts appears to be abuse of discretion because "'[c]lear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact." *Ornelas*, 116 S. Ct. at 1661 n.3.

3.

Our directions to the district court were plain. Our remand required the court to determine "whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue." *Pennington I*, 22 F.3d at 1388. To make this determination, we held that it was necessary for the district court "to decide whether section 237's base period strikes a reasonable balance between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (internal quotation and citation omitted). In formulating this direction to the district court, we, in turn, were obliged to follow another mandate—the mandate of Congress as interpreted by the agency charged by law with the administration of the statute.[8] As we noted in *Pennington I*, federal law requires that state unemployment benefits be determined under a system that is "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). In fulfilling his own responsibilities to administer this statutory directive, the Secretary has interpreted this statutory mandate to require the states to adopt methods of administration that will reasonably insure that benefits to eligible claimants are paid "with the greatest promptness

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[8] *See Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 532 (1985); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *Wilkins v. Sullivan*, 889 F.2d 135, 139 (7th Cir. 1989). *See generally Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

that is administratively feasible." 20 C.F.R. § 640.3(a).[9] The Secretary has further noted that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2).

Given the deference that we owe the Secretary's interpretation of the statute which he is charged with administering, these regulatory directives were the foundation of our direction to the district court. Fundamentally, the judicial task is to determine whether the defendant has fulfilled the statutory duty of implementing a system that ensures the payment of compensation with the "greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). We therefore required the district court to examine the evidence and to determine whether the Illinois scheme strikes a reasonable balance between the plaintiff class' interest in prompt payment and the state's interest in minimizing the costs of delay and in preventing fraudulent claims. The Secretary's regulations provide some guidance in this endeavor. But they could provide a great deal more, and perhaps they should. This determination of whether to provide more explicit guidance, however, is not ours to make; it is reserved for the Secretary and the Congress in its oversight of his administration of the statute. We must work with the tools that have been given us and remember

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[9] The Secretary's interest in prompt payment is supported by the congressional intent and the legislative history of the SSA. The Supreme Court, in *California Dep't of Human Resources Dev. v. Java*, stated that the "objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." 402 U.S. 121, 130-31 (1971). The Court recognized that, although "probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination," that result was the goal of Congress. *Id.*

that our ultimate task is to determine the will of Congress and to see that it is fulfilled by the litigants before us.[10]

B.

We do not believe that the methodology employed by the district court was infirm. The district court noted explicitly that its task was to determine whether the current Illinois system struck a reasonable balance between the interest of the class members in prompt payment and the interest of the state in determining eligibility without incurring unreasonable costs of administration or in preventing fraudulent claims. As the district court noted, the parties agree that, in order to achieve that objective, the court needed to weigh the increase in the benefits that would be paid to members of the class (both in terms of increased dollar amounts and in increased recipients) against the increase in costs of administration to the State in implementing and operating such a system. We think that the district court correctly determined that, to accomplish this task, it needed to con-

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[10] *See Marlowe v. Bottarelli*, 938 F.2d 807, 812 (7th Cir. 1991) ("Intent is, of course, at the heart of the judicial inquiry because the courts endeavor to give effect to the designs of Congress and the agencies to which the legislature has delegated authority. In discerning intent, courts traditionally focus on the language of statutes and regulations because we presume that legislatures and agencies mean what they say . . . .") (internal citations omitted); *United States v. Markgraf*, 736 F.2d 1179, 1182 (7th Cir. 1984) ("Our task, then, is the same as it is in any case involving statutory interpretation: to determine congressional intent. In determining this intent, courts customarily look to several factors: the language of the statute; the legislative history; and the interpretation given by the administrative agency . . . ."), *cert. dismissed*, 469 U.S. 1199 (1985).

sider the availability of alternate schemes and to determine whether those schemes provided a more favorable balance between the number of benefit recipients and the amount of benefits received, on the one hand, and the cost inherent in the administration of such a plan, on the other. IDES never satisfactorily explains how the district court could have accomplished its ultimate objective of determining whether the present Illinois scheme was compatible with the intent of Congress without undertaking such a comparative analysis. Nor do we believe that the district court impermissibly deviated from its assigned task in the course of making this comparison. A reading of the district court's order in its entirety makes clear that it understood its objective: to determine whether the Illinois scheme comported with the demands of the statute and regulations. The court carefully compared the capacity of the current system to fulfill the command of the statute against the capacity of available alternatives to achieve the same goal. It found the present scheme wanting.

In its submission before us, IDES claims that the district court did not give adequate consideration to the drawbacks of the alternative systems. In assessing this criticism, we must remember that the district court was obliged to focus upon only those factors that helped it assess whether the alternate scheme in question produced prompter payment in an administratively feasible manner. It is clear that the court did consider those drawbacks which were relevant to the task before it—the comparative financial burden on the state from the administration of each system.[11] The issue before the court

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[11] As noted earlier, *see supra* note 3, the district court also recognized the relevance of a comparison of the number of fraudulent claims in each system, but it was not presented with evidence that an ABP system would increase fraud.

was not whether IDES had a preference for a particular system for reasons unrelated to the statutory mandate; the issue was whether the current method of eligibility determination fulfilled the command of the statute. The district court properly limited its focus to whether the alternates resulted in the prompter payment of compensation to which the recipients have a right and whether the plan was administratively feasible. The statutory command of the SSA was the sole and appropriate focus of the court's inquiry. There is, therefore, no merit to IDES' argument that the alternates suggested by the plaintiff class ought to be rejected because they produce a paper delay that is longer than the paper delay caused by the current system. The district court quite properly focused on the actual delay in the receipt of benefits under each method and determined that there was less delay under the alternative scheme.

Upon examination of the district court's order, the record and the briefs of the parties, we must conclude that the district court correctly implemented our mandate. After a careful assessment of the evidence, it determined that the current Illinois scheme for determining unemployment eligibility does not fulfill the statutory mandate as interpreted by the Secretary. Given the existence of alternatives that deliver prompter payment without creating significant administrative burdens, the deprivation of compensation, which under the law the recipients are entitled to receive "when due," cannot be justified.

Conclusion

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 4, 1997

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 96-1499

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellee

v.

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 85 C 6327, Paul E. Plunkett, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3725

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiffs-Appellants,

v.

LOLETA DIDRICKSON,* Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—**Paul E. Plunkett**, *Judge.*

ARGUED OCTOBER 26, 1993—DECIDED APRIL 11, 1994

Before ESCHBACH, RIPPLE and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs are a certified class of unemployment insurance claimants who brought action under 42 U.S.C. § 1983 against the Illinois Department of Employment Security ("IDES"). The plaintiff class chal-

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

lenges the definition of "base period" in section 237 of the Illinois Unemployment Insurance Act (the "IUIA"), 820 ILCS 405/237. It maintains that the definition violates the "when due" clause of section 303(a)(1) of the Social Security Act (the "SSA"), 42 U.S.C. § 503(a)(1). Following a bench trial, the district court entered judgment for IDES. For the reasons that follow, we reverse and remand the case to the district court.

I

BACKGROUND

A. *Statutory Scheme*

Although unemployment insurance is administered at the state level, the SSA makes federal funds available to the states to encourage them to enact unemployment insurance laws. However, before the federal government will provide funds for a state to administer its unemployment insurance programs, the Secretary of Labor must certify that a recipient state's program meets certain statutory requirements. *See* 42 U.S.C. §§ 502, 503(b)(2), 504. One of those requirements is the "when due" clause of section 303(a)(1) of the SSA; it requires a state's unemployment insurance laws to provide for "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Department of Labor regulations state that the "when due" clause requires a state to provide for such "methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Although "[f]ederal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law," the regulations make clear that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2).

In Illinois, an eligible unemployment insurance claimant can draw benefits in "the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits." 820 ILCS 405/242. This is known as a claimant's "benefit year." *Id.* However, in order to file a "valid claim" for unemployment insurance, a claimant must have earned sufficient wages during the claimant's "base period."[1] Section 237 of the IUIA defines a "base period" as "the first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237. Thus, section 237's base period excludes the wages a claimant earns in the quarter immediately preceding the quarter in which a claimant files (the fifth quarter, or the "lag quarter") and excludes the wages a claimant earns in the quarter in which the claimant files (the sixth quarter, or the "filing quarter"). For example, for a claimant who filed for benefits in June 1993 (the second calendar quarter of 1993), the resulting base period would have been the four calendar quarters of 1992; the first quarter of 1993 would have been the claimant's lag quarter, and the second quarter of 1993 would have been the claimant's filing quarter. Pursuant to section 237's base period, IDES would consider only the wages the claimant earned in the four calendar quarters of 1992 in determining the claimant's eligibility for unemployment insurance.[2]

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[1] Under section 500E of the IUIA, a claimant must have earned at least $1,600 in the entire "base period" and must have earned at least $440 of that $1,600 outside the calendar quarter in which the claimant's wages were the highest. 820 ILCS 405/500E. For example, if a claimant earned $1,600 over the four calendar quarters that constituted that claimant's base period, the claimant must not have earned any more than $1,160 in any one quarter. Otherwise, the claimant would not have satisfied section 500E's requirement that at least $440 be earned outside the calendar quarter in which the claimant earned the most wages.

[2] To illustrate, the following represents the base period of a claimant who filed for unemployment insurance in June 1993:

(Footnote continued on following page)

Illinois uses its base period scheme because it is a "wage record system" state. Under this system, employers covered by the IUIA report the gross wages of all their employees to the state unemployment security agency on a quarterly basis. Employers must report their employees' wages by the last day of the month following the quarter in which the wages were paid. As a result, IDES experiences peak periods that begin about one week prior to the end of the reporting month; the peak periods last about 3 to 8 weeks with an additional week to process delinquent reports. App. VII at 70-71 (Stipulated Facts). The gap created by the base period in section 237 of the IUIA (i.e., the gap between the end of a claimant's base period and the beginning of a claimant's benefit year) gives employers in a wage record system time to report wage information to the state agency and gives the state agency time to make that information available to local unemployment insurance offices. App. VII at 66-67.

Although a wage record system is the most common system in the United States, some states use a "wage request system," under which a state requests a claimant's wage information from the claimant's employer when the claimant files for unemployment benefits. Because a state agency under this system handles only wage information needed to adjudicate each particular claim, a state agency can request the most recent wage information for each claimant, thereby obviating the need for a substantial gap between the end of a claimant's base period and the beginning of a claimant's benefit year. App. VII at

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[2] *continued*

1st Quarter	(Jan.-Mar. 1992)	earnings considered
2nd Quarter	(Apr.-June 1992)	earnings considered
3rd Quarter	(July-Sept. 1992)	earnings considered
4th Quarter	(Oct.-Dec. 1992)	earnings considered
5th Quarter	(Jan.-Mar. 1993)	earnings not considered (lag quarter)
6th Quarter	(Apr.-June 1993)	earnings not considered (filing quarter)

67-68. Finally, some states move their base periods. Under this approach, when a claimant has insufficient qualifying wages in the first four of the last five completed quarters under an IUIA section 237-type base period, the state agency redetermines the claim based on wages earned in the four completed calendar quarters immediately preceding the filing quarter. App. VII at 68.

B. *Luella Pennington*

Luella Pennington is the class representative for the unemployment insurance claimants. She filed a claim with IDES for unemployment insurance on June 7, 1984, the second quarter of 1984. Under IUIA section 237, Ms. Pennington's base period was January 1, 1983 to December 31, 1983, the four calendar quarters of 1983. Because Ms. Pennington had not earned sufficient qualifying wages in her section 237 base period, IDES denied her application. Ms. Pennington remained unemployed and therefore filed a second claim on October 5, 1984, the fourth quarter of 1984. Her base period for this application encompassed the third and fourth quarters of 1983, and the first and second quarters of 1984. She was entitled to benefits this time because she had earned enough section 500E qualifying wages in the first two quarters of 1984.

Section 237's base period required Ms. Pennington to wait until October 5, 1984 to claim benefits. If IDES had considered lag quarters in determining qualifying wages, Ms. Pennington could have successfully refiled on July 2, 1984, the third quarter of 1984, because IDES would have considered the first two quarters of 1984 in determining her qualifying wages. Instead, she had to wait to file in October 1984, the fourth quarter of 1984, in order to have both the first and second quarters of 1984 considered as qualifying wages under the section 237 base period. Ms. Pennington therefore brought a § 1983 action against IDES on behalf of herself and all others similarly situated alleging that section 237's base period violates the "when due" clause of the SSA. The plaintiff class's first complaint

alleged that it was "administratively feasible," 20 C.F.R. § 640.3(a), for IDES to include as the four-quarter base period both the lag quarter and, if necessary, the filing quarter. The class's second amended complaint, however, alleges only that it would be administratively feasible for IDES to consider the lag quarter in calculating a claimant's qualifying wages, thus making the base period the four calendar quarters immediately preceding the filing quarter.

C. *District Court Proceedings*

IDES moved to dismiss the plaintiff class's complaint and moved for summary judgment. One of IDES's main arguments was that section 237 is not an administrative method subject to the "when due" clause, but rather is an eligibility provision, which Congress left the states to determine. Section 237, IDES submitted, is a monetary eligibility provision which defines the class of claimants to whom payments are due. Because Ms. Pennington and the plaintiff class had insufficient qualifying wages under section 237, they were not "due" anything. IDES thus claimed that the "when due" provision was inapplicable because it applies only after a claimant has been deemed eligible for benefits under state law. The district court denied IDES's motions, as well as its motion to reconsider. In its June 13, 1989 Memorandum Opinion and Order, the court relied on *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and stated that the "when due" clause requires prompt determination of eligibility as well as prompt payment of benefits to eligible claimants. June 13, 1989 Mem. Op. at 7-8.

The case proceeded to a bench trial in October 1990. Although the parties stipulated to many facts, procedures, and issues, each side presented evidence concerning the "administrative feasibility" of implementing an alternative

base period definition.[3] In an October 21, 1992 Memorandum Opinion and Order, issued two years after the bench

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[3] The plaintiff class's expert witness, Peter Kauffman, conceded that, based on the speed of claim processing, the control of fraud, and the cost of administration, the wage record system which IDES currently uses is a better method than the wage request system. However, Kauffman testified that there existed an administratively feasible method, which he termed "Alternative I," by which IDES could minimize the delay caused by section 237's base period. The heart of Alternative I consists of using a movable base period on a limited basis. Whenever a claimant lacked sufficient qualifying wages in the section 237 base period, IDES could make a determination of a claimant's qualifying wages based on the wages a claimant earned in the lag quarter. Thus, Alternative I's base period for claimants with insufficient wages in the section 237 base period would be a moved base period comprised of the four calendar quarters immediately preceding the filing quarter (i.e., the second, third, and fourth quarters of the section 237 base period plus the lag quarter).

Because employers need report their employees' wages only by the last day of the month following the quarter in which the wages were paid, a claimant's lag quarter wages will not always be posted in the first few weeks of the claimant's filing quarter. (Kauffman's study found that 16% of a completed quarter's wage data is processed and available by the end of the fourth week of the following quarter; 73% is available at the end of the eighth week.) Under Alternative I, therefore, when a claimant files who does not have sufficient qualifying wages in the claimant's section 237 base period, IDES first would run a "threshold" test using the wage information from the second, third, and fourth quarters of the section 237 base period. If the claimant had not earned at least $440 in those three quarters, the claimant would be ineligible by statute for benefits regardless how much the claimant earned in the lag quarter. *See supra* note 1 (discussing monetary eligibility requirements of IUIA section 500E). According to Kauffman, this threshold test would eliminate two-thirds of those without qualifying wages under section 237 from further consideration. If a claimant's lag quarter wages were not processed and available, and that claimant passed the section 500E threshold test, IDES's computer would issue a monetary finding as soon as the lag quarter wages were posted. Of course, for those claimants whose lag quarter wages were posted when they filed their claim and who did not have

(Footnote continued on following page)

[3] *continued*
sufficient qualifying wages under section 237, IDES's computer would issue a second finding of eligibility on the basis of the movable base period comprised of the four completed calendar quarters preceding the filing quarter. Under Alternative I, those claimants who had sufficient qualifying wages in the four quarters preceding the filing quarter would receive unemployment insurance benefits retroactive to their initial claim.

Kauffman also set out in his testimony two other possible methods. "Alternative II" would consist of speeding administration of Alternative I by sending wage requests to employers of claimants who applied in the first month of the filing quarter, whose lag quarter wages were not posted at application time, and who passed the threshold test. "Alternative III" would do the same for all such claimants, not just those who applied in the first month of the filing quarter. Kauffman testified that the marginal expense of these two alternatives, in comparison with Alternative I, exceeded their marginal benefits.

Both the plaintiff class and IDES presented evidence on the costs of implementing the movable base period of Kauffman's Alternative I. Kauffman testified that only one additional IDES staff person would be necessary to execute Alternative I. In addition, Kauffman stated that one-time computer conversion costs would be $50,000 for equipment and $40,000 for one computer programmer's compensation. IDES's expert witness, on the other hand, Michael Marshman, estimated that the cost of computer conversion under Alternative I would run approximately $2 million. Melissa Barton, manager of IDES's computer, estimated that computer conversion would run about $1.7 million and that IDES would need to employ three or four additional programmers.

Finally, both sides stipulated that, in 1986, 526,469 claimants filed unemployment benefits applications with IDES. IDES denied 63,518 claimants benefits because they lacked qualifying wages; however, 15,034 of those denied would have had sufficient qualifying wages if IDES had counted the wages they had earned in the lag quarter, as would be the case under the plaintiff class's Alternative I. Moreover, an additional 9,115 claimants would not have been denied benefits in 1986 if section 237's base period included the wages they had earned in their filing quarters. Under Alternative I, which includes lag quarter wages, these claimants could have filed a valid claim for benefits three months sooner than under the section 237 base period. *See* App. VII at 66 (Stipulated Facts).

trial, the district court handed down its judgment in favor of IDES. However, instead of assessing the evidence at trial and making express findings of fact on the issue of administrative feasibility, the district court reversed its earlier decisions and ruled that section 237 was an eligibility requirement. As such, the district court held that IDES was entitled to judgment as a matter of law. The court reasoned that claimants who do not have sufficient qualifying wages under section 237's base period, but who would if lag quarter wages were included in IDES's determination, do not experience any "delay" in receiving benefits because those benefits are not "due." Mem. Op. at 12. Rather, such claimants are "simply ineligible" for benefits at the time they apply. Mem. Op. at 11. Thus, according to the district court, section 237 is not an administrative method subject to the "when due" clause of section 303(a)(1) of the SSA, but rather a "valid eligibility" provision, the content of which Congress has left to the states. The district court, however, did not end its discussion at that point. Although it had already held as a matter of law that section 237 was not subject to the "when due" clause, the district court proceeded to make a brief determination of whether the delay section 237's base period creates is justifiable under the "when due" clause. The court stated that, because section 237's base period did not create an "infinite delay," *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982), section 237 did not violate the "when due" clause or any corresponding regulations. Oct. 21, 1992 Mem. Op. at 15.

II

ANALYSIS

On appeal, we must determine de novo whether the definition of base period in IUIA section 237 is an administrative method subject to the "when due" clause of the SSA and its corresponding regulations, or whether it is an eligibility provision and thus beyond the reach of the

"when due" clause.[4] If we determine that section 237's base period is an administrative method, we must weigh the burdens and benefits of section 237 against the burdens and benefits of the plaintiff class's proposed movable base period to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

A. *Section 237: Eligibility Provision or Administrative Method?*

1.

At the outset, we must address an initial argument of IDES, and of the Secretary of Labor as amicus curiae in support of IDES. IDES submits that, because a federal court lacks the authority to rewrite a state statute such as IUIA in granting an injunctive remedy, we therefore cannot grant relief to the plaintiff class in this case. IDES acknowledges that a federal court can enjoin the practice or use of a state statutory provision that violates the "when due" clause. *See, e.g., California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 135 (1971) (enjoining California statute which provided for the withholding of insurance benefits upon an employer's appeal from the initial eligibility determination because it violated the "when due" clause). However, IDES argues that the plaintiff class's suit seeking to enjoin IUIA section 237 as applied to the class should be dismissed because the relief the class seeks

[4] The plaintiff class concedes that valid state eligibility requirements, such as "voluntary leaving," 820 ILCS 405/601, are not subject to the SSA's "when due" clause. Appellants' Br. at 25 ("[A] state does not violate the 'when due' clause by delaying payment of benefits to enforce provisions that govern eligibility.") (citing 20 C.F.R. § 640.1(a)(2) (stating that "applicable federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law")); *see also Jenkins*, 691 F.2d at 1229 (stating that "the state has a legitimate interest in enforcing its valid eligibility criteria").

cannot be effected by merely enjoining section 237. Rather, IDES states that, because section 237 would remain in effect for the great majority of unemployment insurance claimants, the only remedy that would give the plaintiff class relief is the ordering of a special alternative base period. Such equitable relief, IDES contends, is an inappropriate remedy to impose on a sovereign state. *Cf. Jenkins*, 691 F.2d at 1234 (ordering the district court to enjoin the IUIA provision at issue but to do so in a judgment that "does not specify the exact measures that the state must take to bring itself into compliance with the law").

We cannot accept this argument. Although it is doubtless true that a federal court lacks the authority to rewrite IUIA section 237 for the Illinois General Assembly, relief can be granted to the plaintiff class in this case without doing so. Although the plaintiff class has tendered an alternative base period system, the remedial options open to the district court are not limited to entering an injunction ordering IDES to implement that alternative base period. Indeed, the plaintiff class does not even urge that such relief be granted. Rather, the proposed alternative base period is merely the plaintiff class's illustration that section 237's base period, as applied to the plaintiff class, violates the timeliness directive of the "when due" clause because a more prompt method of determining qualifying wages is administratively feasible. Thus, if it is determined that section 237 is an administrative provision and not an eligibility requirement, and if it is determined that there exists an administratively feasible alternative method by which to determine qualifying wages more promptly, the appropriate remedy will consist only of enjoining section 237 as applied to the plaintiff class. Because "the state should be permitted to decide, in the first instance, how [section 237] can be altered to comply with section 303(a) of the Social Security Act," it would be in the hands of the state to implement "the exact measures that the state must take to bring itself into compliance with the law." *Id.*

2.

The Secretary of Labor, appearing in this court as amicus curiae, notes at the outset of his presentation that it is clear that Congress intended that the states have "free rein" in designing the eligibility criteria for their respective unemployment programs. This statement is undoubtedly true. *See New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539 (1979) (plurality opinion) (stating that "Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria"); *Jenkins*, 691 F.2d at 1232 (acknowledging "the state's competing interest in enforcing its eligibility criteria, the validity of which is not questioned"). Nevertheless, this truism simply begs the question and, consequently, contributes nothing to the inquiry before us. Rather, we must address an antecedent issue—whether IUIA section 237 is an eligibility requirement rather than an administrative matter subject to the "when due" clause.

The Secretary argues that, because Congress noted the existence of lag periods while attempting to remedy the problem of so-called "double dipping," we ought to conclude that Congress determined that such periods are indeed acceptable. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845-46 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' ") (citation omitted). We do not believe that it is appropriate to read such a determination into Congress' selection of another remedy for that problem. Congress' decision to deal with the so-called "double dipping" problem by requiring intervening work rather than abolishing lag periods cannot fairly be characterized as a focused congressional examination of the problem before us in this litigation. Consequently, that decision does not counsel us to conclude that Congress has revisited this area and declined consciously

to address the problem that the litigants are now addressing in this litigation. Indeed, the provision upon which the Secretary relies amended the Federal Unemployment Insurance Tax Act, 26 U.S.C. §§ 3301 *et seq.* The legislation had nothing to do with the operation of the "when due" clause and certainly did not address the issue of whether the type of base periods used in the Illinois statute violated that clause. When there is no indication that Congress has focused on the matter, legislative silence is indeed a very poor guide to the discernment of legislative intent. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

The Secretary also reminds us that we are obliged to defer to the interpretation given a statute by the agency charged with the responsibility for administering it so long as the agency's interpretation of the statute is based upon a permissible reading of that statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *accord National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). Our cases certainly demonstrate loyal adherence to that principle. *See, e.g., Hanson v. Espy*, 8 F.3d 469, 472-73 (7th Cir. 1993); *United States v. Baxter Health Care Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 906-07 (7th Cir. 1990). Nevertheless, we have never interpreted this principle as a direction to approach our review of all government positions with a rubber stamp. For instance, along with the other circuits, we have distinguished between agency positions developed in the heat of litigation and those that reflect the deliberate attempt of the agency to implement the will of Congress through the regulatory process. *See, e.g., Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers*, 3 F.3d 994, 1003 (7th Cir. 1993) (declining to defer to agency's amicus brief when the agency had not issued any regulation or opinion on the subject because "[c]ourts do not defer to 'agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice' ") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)), *petition for cert. filed*, 62 U.S.L.W.

3378 (U.S. Nov. 12, 1993) (No. 93-768). Similarly, we have distinguished between those statements of legislative intent that the agency embodies in formal regulations[5] and that, consequently, have the benefit of careful crafting and comment, and those more informal statements that do not necessarily reflect the deliberate focus of the entire agency on the issue of congressional intent. *See, e.g., Doe v. Reivitz*, 830 F.2d 1441, 1446-47 (7th Cir. 1987) (stating that interpretive documents "are not entitled to the same degree of deference commanded by the high-powered regulations reviewed in *Chevron*"), *amended*, 842 F.2d 194 (7th Cir. 1988); *see also Hanson*, 8 F.3d at 472 n.3 (7th Cir. 1993) (noting same); *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 1360 (1993).

We are mindful of our obligation to defer to the interpretation of the agency whenever that interpretation can be said to embody a deliberate and considered interpretation of the legislative intent. We therefore have examined with great care the sources that, in the agency's view, evidence its longstanding view that issues of lag periods are matters of eligibility and therefore are not subject to the "when due" clause and, indeed, are within the exclusive responsibility of the states. At the outset, we think it is important to note that the Secretary does not invite our attention to any instance in which, by formal regulation, the agency has squarely stated that the length of lag periods is a matter of eligibility within the exclusive authority of the states. Certainly, the simple definitional section for "base period" defines that period as "the period as determined under the applicable state law for the individual's applicable benefit year." 20 C.F.R. § 615.2(b). But this definition hardly qualifies as an explicit determination by the Secretary that lengthy lag periods are beyond the scope of the "when due" clause.

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[5] *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (noting that regulations issued by an agency under statutory authority have the force and effect of law).

The Secretary also submits that the position of the agency can be discerned from certain "draft bills" provided to the states at the time of the initial enactment of the legislation in 1937 and again in 1950. In support of its position, the agency stresses that these "drafts" were merely advisory in nature and that the accompanying explanation explicitly recognized that it was the right and the responsibility of the states to decide "what kind of legislation it desires and how it shall be drafted." We recognize that particular deference is due to an agency pronouncement that " 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently, and smoothly while they are yet untried and new.' " *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (citation omitted); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the case before us, however, it must be admitted that the "pronouncements" at issue are, to put it mildly, ambiguous evidence of the Secretary's interpretation. Although one of the drafts does include a lag period like the one in the present Illinois statute, by the Secretary's own admission, these "draft bills" were advisory in nature and hardly can be accorded the same weight as that given the formal regulations of the department. *See Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 485 (1977) (declining "to read implications of the draft bills into the Social Security Act").

These "draft bills" do not, moreover, directly address the issue here: whether the lag period arrangement can be termed a matter of eligibility as opposed to a matter of administration.[6] We are asked to imply that the general

[6] The Secretary has made use of the draft bills to demonstrate that a lag period such as IUIA section 237 is an eligibility provision and not an administrative method. However, we also note that, if such a lag period is an administrative method and not an eligibility provision, the mere fact that the draft bills take notice of a lag period similar to IUIA section 237 does not indicate that

(Footnote continued on following page)

statement—that the state has the right to decide the contours of its own legislation—establishes that the agency regards the lag period as a matter of eligibility rather than an administrative matter. It must be remembered, however, that the states also have a great deal of latitude with respect to administrative matters, although that discretion is cabined somewhat by the strictures of the "when due" clause. One must read a great deal into the "draft bills" to determine that such a statement is a short hand for a definitive agency determination that the lag period issue is not subject to the "when due" clause.

An additional ambiguity in the Secretary's position must also be noted. If the matter of the lag periods is beyond the scope of the "when due" clause and therefore not a matter within the responsibility of the Secretary, it is difficult to understand why the agency found it necessary to devote such a great deal of effort to a matter not within its cognizance. As we have noted, the matter of lag times is addressed in the "draft bills." Again, in a 1962 policy statement, the agency addressed the matter and counseled the states agencies that lag periods ought to be as short as possible. While these agency utterances do not establish that the agency has treated lag periods as a matter of administration, they certainly cast a great deal of doubt on the proposition that the agency has taken the opposite position and consistently has treated the device as a matter of eligibility, the sole concern of the state. Absent definitive guidance from the Secretary, we must rely more heavily on the caselaw which has dealt with the issue, to which we now turn.

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[6] *continued*
that lag period is in compliance with the "when due" clause or the corresponding regulations. A state must pay unemployment benefits "with the greatest promptness that is administratively feasible." 29 C.F.R. § 640.3(a). Needless to say, what was "administratively feasible" when the draft bills were written—1937, 1950, and 1962—is much different from what is administratively feasible in today's technologically advanced world.

3.

The plaintiff class submits that several cases demonstrate section 237 to be an administrative provision. In *Fusari v. Steinberg*, 419 U.S. 379, 388 n.15 (1975), a district court had interpreted a prior Supreme Court summary affirmance in *Torres v. New York Department of Labor*, 405 U.S. 949 (1972), as standing for the proposition that "benefits are not 'due' under § 303 until administratively deemed payable." The Supreme Court stated that such an interpretation of the "when due" clause "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." *Fusari*, 419 U.S. at 388 n.15; *see also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) ("We find no merit in the Secretary's argument that the 'when due' requirement of § 303(a)(1) . . . does not apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits.").

The plaintiff class also relies on our decision in *Jenkins*, 691 F.2d at 1229, in which we relied on *Fusari* in rejecting the same argument IDES presents in this case, albeit in the context of a different section of the IUIA. The proviso at issue in *Jenkins* concerned eligibility decisions for unemployment insurance claimants who had allegedly been discharged because of a felony or theft in connection with the claimant's work. *Id.* at 1227. The proviso, IUIA section 602 B, stated that "the determination of [the affected claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings arising therefrom." *Id.* IDES argued that the "when due" clause did not apply to that proviso

> because benefits do not become due until the criminal charges are resolved; in [IDES's] view the held in abeyance proviso postpones the determination of eligibility, rather than the payment of benefits to eligible persons.

Id. at 1229. We rejected IDES's argument. We stated that it would unduly limit the "when due" clause to narrow

issues of payment mechanisms, thereby precluding the use of the clause as a means of effectuating the purposes of the SSA (i.e., prompt determination and payment of unemployment insurance to achieve "humane" and "macroeconomic" objectives). *Id.* The plaintiff class thus submits that *Jenkins* demonstrates that the "when due" clause requires prompt eligibility determinations, not just prompt payment of benefits. *See id.* ("We think Congress had larger objects in view than the ministerial competence of state comptrollers."). Moreover, the class asserts that *Jenkins* shows that IDES cannot make an end-run around a functional analysis of section 237 merely by labelling it an eligibility provision. Rather, section 237's purposes must be studied to determine whether it is subject to the "when due" clause.

The plaintiff class notes that, according to the Supreme Court, valid eligibility criteria "define the class of persons eligible for benefits." *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977). By contrast, the class maintains that section 237's base period does not define the class of eligible claimants. Instead of determining *what* earnings IDES will consider, section 237 determines *when* IDES will count those earnings as qualifying wages. This is demonstrated, the class asserts, by the fact that a claimant not yet eligible for benefits owing to section 237's lag quarter need only wait to become eligible in the future. By contrast, a claimant ineligible under a valid eligibility criterion, such as the IUIA "voluntary leaving" provision, must affirmatively rectify the situation by, in this example for instance, "becom[ing] reemployed and ha[ving] had earnings equal to or in excess of his weekly benefit amount in each of four calendar weeks." 820 ILCS 405/601. Finally, the plaintiff class states that both sides agree that valid eligibility criteria measure a claimant's "continued and current attachment to the labor force." *Fleiszig v. Board of Review*, 104 N.E.2d 818, 821 (Ill. 1952). However, the class submits that section 237's base period causes class members with relatively strong attachment to the work force to wait until that attach-

ment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over).

IDES submits that the district court correctly held that section 237 is a valid eligibility requirement beyond the reach of the "when due" clause and corresponding regulations, not an administrative method. In its view, the cases that have found state unemployment insurance provisions to conflict with the "when due" clause have all dealt with situations in which an initial determination of eligibility had been made, thus making payment in those cases "due" and hence subject to the "when due" clause. In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971), for example, the Court held that a California procedure which suspended payments for a median period of seven weeks pending administrative appeal violated the "when due" clause; however, the statute violated the prompt payment requirement "after an initial determination of eligibility." IDES attempts to distinguish *Fusari* on the grounds that each plaintiff in that case "had filed a valid initiating claim and received benefits for a period of time." *Fusari*, 419 U.S. at 382 n.3. IDES concedes that *Jenkins* stated that benefits cannot be delayed by postponing eligibility determinations; however, it contends that no delay in eligibility status has occurred, because claimants such as the plaintiff class are simply ineligible when they apply. Finally, like the plaintiff class, IDES submits that eligibility criteria measure attachment to the work force. Unlike the class, though, IDES submits that section 237's base period, like other eligibility criteria, aids in excluding those claimants with the most tenuous attachment to the work force.

Although IDES's contention concerning section 237's status as an eligibility provision is "not an absurd argument," *Jenkins*, 691 F.2d at 1229, we cannot accept it. First, IDES cannot persuasively distinguish *Jenkins*. In addressing the same argument in essentially the same context, we recognized in *Jenkins* that such an argument would

render the "when due" clause a virtual nullity, limiting it to those cases "where the state concedes that unemployment is due someone and simply fails to establish administrative mechanisms that result in paying him within a reasonable time." *Id.*; *see also Fusari*, 419 U.S. at 388 n.15 (stating that this argument "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits"). If the content of the "when due" clause were so eviscerated, "a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide." *Jenkins*, 691 F.2d at 1229. As we stated in *Jenkins*, we believe that Congress had larger purposes for the clause in mind.

In the same vein, the Secretary as amicus curiae asserts that *Jenkins* is inapposite because an initial determination of eligibility had already been made in that case, which thus implicated the "when due" clause.[7] The proviso at

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[7] We recognize that in some of the relevant cases the state agency at issue had made an initial determination of eligibility and that payment was therefore "due." *See, e.g.*, *Java*, 402 U.S. at 133 (holding that the "when due" clause was violated by lengthy delay in administrative appeal "after an initial determination of eligibility ha[d] been made"). In *Fusari*, however, the Supreme Court indicated that its decision in *Java* did not turn on the fact that only payments, and not eligibility, were suspended by the effect of the statute at issue in that case. Rather, *Fusari* rejected the conclusion of the district court in its case that, because a claimant who had initially been determined eligible subsequently had been deemed ineligible, payments were no longer "due" under the "when due" clause. The Court stated that "[s]uch a definition of the 'when due' requirement of federal law would leave little vitality to *Java*." *Fusari*, 419 U.S. at 388 n.15.

Although no Supreme Court case has addressed the applicability of the "when due" clause when no initial determination of eligibility has been made, the Third Circuit was presented with such a scenario in *Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980). In that case, the Secretary of Labor tried to distinguish *Fusari* on the basis that "the claimant had at least received an initial ad-

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issue in *Jenkins*—the "held in abeyance" proviso—expressly stated that "a determination of [a claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings." *Id.* at 1227. In *Jenkins*, therefore, no initial determination of benefits had been made and no payments were "due" in the sense that IDES urges on us in this case. We nonetheless held that the provision at issue was subject to and, indeed, violated the "when due" clause. Similarly, we now hold that section 237 is subject to the "when due" clause.

Second, IDES argues at length that section 237 functions as a measurement of each claimant's attachment to the work force. IDES submits that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement. *See supra* note 4. However, IDES has conceded in more than one place that the gap created by section 237's base period, in which a claimant's lag quarter wages are not reported, "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. VII at 67 (Stipulated Facts); *see also* Appellee's Br. at 42 (stating that "[s]ection 237's base period facilitates the State's utilization of wage recording"). In other words, section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system. In a world of high-speed information exchange, the lag quarter

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[7] *continued*

ministrative determination of eligibility for unemployment compensation benefits." *Id.* at 661 n.14. The Secretary argued "that where a claimant has never been determined eligible, the 'when due' requirement is inapplicable." *Id.* The court rejected the Secretary's argument, stating that the Secretary's "conclusion would no less nullify the 'vitality' of *Java* than the conclusion of the *Fusari* district court." *Id.*

would not exist; yet an eligibility requirement like the "voluntary leaving" provision would. *See* 820 ILCS 405/601. We therefore hold that section 237 is an administrative provision and, as such, is subject to the timeliness requirements of the "when due" clause.

B. *Whether Section 237 Violates the "When Due" Clause*

The next analytical step is to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). To do so, it is necessary to decide whether section 237's base period "strikes a reasonable balance" between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims. *Jenkins*, 691 F.2d at 1230, 1233.

As a "statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility," assessing section 237 "inevitably will generate fact-specific applications." *Fusari*, 419 U.S. at 388 n.15. Unfortunately, however, because the district court entered judgment for IDES as a matter of law, it made practically no helpful factual findings from the week-long trial it conducted.[8]

[8] The only findings the district court made that could be said to be factual stemmed from its determination that section 237 does not present an "indefinite delay" to unemployment insurance claimants. Mem. Op. at 15. The court engaged in this determination despite the fact that it had already held as a matter of law that section 237 was an eligibility provision not subject to the "when due" clause. For reasons difficult to discern, the district court treated dicta set forth in *Jenkins* (in the context of discussing a state's obligation to make prompt eligibility determinations) as establishing a legal standard. *Jenkins* stated that "[the claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment." *Jenkins*, 691 F.2d at

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Because this court is not the proper forum in which to engage in factual findings, we must remand this case to the district court. In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court decided to resolve whether a certain Ohio statute conflicted with the "when due" clause even though the district court had not dealt with the issue, much less made any findings of fact. However, the Court did so because the resolution of that issue did not entail any findings of fact. The Court indicated that if findings of fact had been involved, it likely would have remanded the case to the district court. *Id.* We therefore believe that the proper course is to remand this case so that the district court can proceed to determine, on the evidence it has already taken and any new submissions from the parties, whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue.[9] The district court's sole task is to determine whether the current Illinois scheme is compatible with the "when due" clause. It is not its responsibility to mandate an alternative. If the district court should determine that the current Illinois scheme does not

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[8] *continued*
1229. The term "indefinitely" only made the point that states are required under the "when due" clause not only to make prompt payment of benefits, but also to make eligibility determinations promptly; it was not a new legal standard for examining eligibility criteria.

[9] We have held as a matter of law that lag periods such as IUIA section 237 are administrative methods and not eligibility provisions, and as such are subject to the strictures of the "when due" clause. We note, however, that with respect to whether a given lag period is acceptable under the Secretary's regulations—specifically, whether it reasonably insures payment of benefits "with the greatest promptness administratively feasible," 29 C.F.R. § 640.3(a)—the Secretary has the authority to issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations.

comply with the "when due" clause—a determination upon which we emphatically express no opinion—it will be the prerogative of Illinois, not the district court, to determine the alternative.

Conclusion

For the foregoing reasons, we reverse the decision of the district court that section 237 is an eligibility provision as a matter of law. We hold that section 237 is an administrative method subject to the strictures of the "when due" clause of the Social Security Act. We therefore remand this case to the district court for factual findings and a determination of the issue of section 237's compliance with the "when due" clause and corresponding regulations.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1994.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellant,

No. 92-3725 v.

LOLETA DIDRICKSON*, Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—Paul E. Plunkett, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on May 16, 1994 by

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

defendant-appellee, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiffs,

No. 85 C 6327 vs.

LYNN DOHERTY,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs['], Luella Pennington, individually and on behalf of other similarly situated persons, motion for judgment is granted and judgment is entered in plaintiffs['] favor. The defendant, Lynn Doherty, is hereby enjoined permanently from applying section 237 of the Illinois Unemployment Insurance Act to the plaintiff class. The District Court retains jurisdiction over the case to enforce this judgment.

This is a final and appealable order.

February 1, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

[Dated February 1, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons, Plaintiffs,	)	
v.	)	No. 85 C 6327 Hon. Paul E. Plunkett
LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity, Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case is before us on the plaintiffs' motion for judgment. At issue is whether the manner in which the Illinois Unemployment Insurance Act defines "base period" violates the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] For the reasons set forth below, we conclude that it does. Therefore, we grant the motion and enter judgment in favor of the plaintiffs, and we

[1] The plaintiffs sued under 42 U.S.C. § 1983.

enjoin the defendant permanently from applying section 237 to the plaintiff class.

Findings of Fact

Based upon the evidence presented at trial and on remand, this Court finds as follows:

I. *Illinois' Current System*

1. Plaintiffs are claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq.*[2] (Am. Final Pretrial Order, at 2.) Their claims for benefits have been either delayed or denied because of the manner in which "base period" is defined in the IUIA. (*See id.*)

2. Defendant Lynn Doherty is the Director of the Illinois Department of Employment Security ("IDES") and is responsible for the administration of all unemployment insurance and employment service programs in Illinois. (*See id.*, Stip. Facts, ¶ B.1.a.) She is sued in her official capacity.[3] (*Id.*, ¶ B.1.b.)

3. IDES is Illinois' state employment security agency ("SESA"). (*Id.*, ¶ B.1.c.) IDES operates through a central office located in Chicago and local offices located throughout the state. (*Id.*, ¶ B.1.d) The local offices accept claims for benefits, process those claims, and initially adjudicate them. (*Id.*)

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[2] Formerly Ill. Rev. Stat. ch. 48, §§ 301 *et seq.*

[3] References to "the defendant" and "IDES" are used interchangeably herein.

4. To be eligible for benefits, a claimant must have been paid wages for insured work during the base period of not less than $1,600, of which at least $440 must have been paid during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest. 820 ILCS 405/500(E). (Am. Final Pretrial Order, Stip. Facts, ¶ A.1.)

5. Section 237 of the IUIA defines "base period" as the first four of the last five completed calendar quarters immediately preceding the claimant's benefit year.[4] 820 ILCS 405/237. (Am. Final Pretrial Order, Stip. Facts, ¶ A.4.)

6. Claimants with sufficient wages in their base period are "monetarily eligible" for benefits. (*Id.*, ¶ A.1.)

7. Whether a claimant is monetarily eligible is resolved by a "finding." 820 ILCS 405/701. (Am. Final Pretrial Order, ¶ A.2.) When a claimant first files for benefits, IDES' staff in the local office accesses the Benefits Information System ("BIS"), a computer-based processing system which stores information regarding the payment of unemployment insurance benefits to claimants, processes payments of benefits to claimants, and reports on benefit payment activity. (*Id.*, ¶ D.1.) When a claim is entered on the BIS, the computer generates a document which indicates the claimant's base period, the wages in each quarter of the base period, and the resultant benefit amount. (*Id.*, ¶ D.2.) The document reflects a "finding." (*Id.*)

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[4] A "benefit year," for initial claims, is the one year period beginning on the first day of the week (i.e., Sunday) in which the individual first files a valid claim for benefits. 820 ILCS 405/242.

8. If a claimant is found to be monetarily eligible, he or she is determined to have filed a "valid claim."[5] 820 ILCS 405/242. (Am. Final Pretrial Order, Stip. Facts, ¶ A.2.)

9. The manner in which "base period" is defined in section 237 prohibits IDES from considering a claimant's wages earned in either the calendar quarter in which his or her claim is filed (the "filing quarter") or the immediately preceding calendar quarter (the "lag quarter"). (*Id.*, ¶ A.5.) Where a claimant filing an initial claim for benefits needs his or her filing quarter or lag quarter wages considered in order to be monetarily eligible, the manner in which "base period" is defined in section 237 results in a determination that the claimant is ineligible for benefits as of the date of the initial claim. (*Id.*, ¶ A.6.)

10. Claimants who do not have sufficient wages in the base period, but who would be monetarily eligible if their lag quarter or filing quarter wages, or both, were considered, may be required to wait up to six months in order to file a valid claim for benefits. (*Id.*, ¶ A.7.)

11. A claimant, determined to be monetarily ineligible on his or her initial claim, may file a second claim if there are sufficient wages in the second claim base period. (*Id.*, ¶ A.8.) Where a claimant's second claim is valid, IDES treats the claimant as ineligible to receive benefits for the weeks between the filing of the initial claim and the second, valid claim. (*Id.*)

12. Plaintiff Luella Pennington ("Pennington") filed an initial claim for benefits on June 7, 1984. (*Id.*, ¶ B.2.b.)

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[5] A claimant with a valid claim may be denied benefits for non-monetary reasons, such as "misconduct" or "voluntary leave." *See, e.g.*, 820 ILCS 405/601, 602. (Am. Final Pretrial Order, Stip. Facts, ¶ A.2, n.4.)

The base period created by that claim consisted of the four calendar quarters in 1983. (*Id.*)

13. Pennington earned no wages for insured work during 1983. (*Id.*, ¶ B.2.c.) Therefore, she was not monetarily eligible for benefits based on her June 7, 1984, claim. (*Id.*)

14. Pennington earned wages for insured work in the first and second quarters of 1984. (*Id.*, ¶ B.2.d.)

15. Pennington filed a second claim for benefits on October 5, 1984. (*Id.*, ¶ B.2.e.) The base period created by her second claim consisted of the last two quarters of 1983 and the first two quarters of 1984. (*Id.*, ¶ B.2.f.) Pennington had sufficient wages in the base period created by her second claim to make her monetarily eligible for benefits. (*Id.*, ¶ B.2.g.) She was paid benefits beginning the week of October 5, 1984. (*Id.*)

16. By order of July 11, 1986, this Court certified a class defined as follows:

> All claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("the Act"), who since July 15, 1983, have been, are being or will be denied such benefits by the Illinois Department of Employment Security solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of Section 237 of the Act.

(*Id.*, ¶ B.3.a.)

II. *Wage Record and Wage Request Systems*

17. States generally use one of two systems, the wage record system and the wage request system, to compile wage data in order to determine whether unemployment

insurance benefits claimants have sufficient wages to qualify for benefits. (*Id.*, ¶ C.1.)

A. *Wage Record Systems Generally*

18. Under a wage record system, those employers covered by the state's unemployment insurance statute report the gross wages of all their employees to the state's SESA on a regular (usually quarterly) basis. (*Id.*)

19. In a wage record system, there is a gap between the end of the claimant's base period and the beginning of the claimant's benefit year. (*Id.*, ¶ C.3.) This gap is necessary because some time is required for employers to report wages and for the SESA to make that information available to the local offices where claims are first taken and adjudicated. (*Id.*)

B. *Illinois' Wage Record System*

20. Illinois uses the wage record system, which is the one most commonly used today. (*Id.*, ¶ C.2.)

21. On a quarterly basis, Illinois employers file reports with IDES of the gross wages paid to their employees. (*Id.*, ¶ D.3.) Employers are required to report wages by the last day of the month following the quarter in which the wages were paid (the "reporting months"), that is, on April 30, July 31, October 31, and January 31. (*Id.*, ¶ D.6.)

22. IDES receives about eighty percent of employers' wage reports in a ten-day period between the last five days before the end of a reporting month and the first five days after the end of a reporting month. (*Id.*, ¶ D.11.)

23. Employers can submit their wage reports on a form called a UC 3/40. (*Id.*, ¶ D.5.) About eighty-five percent

of employers file their UC 3/40's in a timely fashion. (*Id.*, ¶ D.8.)

24. In 1990, it took from one to five weeks before the wage information from the UC 3/40's was put into IDES' computers. (*Id.*, ¶ D.7.) At the end of 1994, with staff and budget constraints, IDES input only 32.5 percent of wage reports by the sixth week of the quarter. (Pl. Ex. 23 at 8.)

25. Approximately three percent of employers in Illinois submit their wage reports on magnetic tape. (Am. Final Pretrial Order, Stip. Facts, ¶ D.12.)

26. After a magnetic tape is received, it takes twelve to thirty-six hours to post the information on the IDES computers. (*Id.*, ¶ D.15.) During peak periods, it can take up to seventy-two hours. (*Id.*)

27. There are four peak periods at IDES resulting from the submission of employers' wage reports. (*Id.*, ¶ D.10.) The peak periods begin about one week prior to the end of the reporting months, and last for about three to eight weeks. (*Id.*) An additional week is needed to process delinquent reports. (*Id.*)

28. Under Illinois' wage record system, there is a gap between the last day of the fourth of the five completed calendar quarters prior to the beginning of the filing quarter (the end of the claimant's base period) and the Sunday of the week in which the claimant files for benefits (the beginning of the claimant's benefit year). (*Id.* ¶ C.3.)

C. *Wage Request Systems Generally*

29. Under a wage request system, wage information for a particular claimant is requested of the claimant's employer when the claimant files a claim. (*Id.*, ¶ C.4.) Thus, wage information is not reported to a SESA except

as required to adjudicate a claim. (*Id.*, ¶ C.5.) As a result, the SESA can request the most recent wage information for the claimant, that is, the claimant's wage information for the year just prior to the filing of the claim. (*Id.*) Wage request systems have either no gap or no substantial gap between the end of the base period and the beginning of the benefit year. (*Id.*)

30. In early 1995, only two states, Michigan and New York, used wage request systems. (Pl. Ex. 21 at 4, n.5.) Michigan is changing to a wage record system, which will be in place in 1997. (*Id.* at 4, n.6.)

III. *"Moveable" or "Alternative" Base Periods*

31. A few states use a "moveable" or "alternative" base period ("ABP") where a claimant needs to have his or her more recent wages considered in order to qualify. (Am. Final Pretrial Order, Stip. Facts, ¶ C.6.) Using an ABP, the SESA first looks at the wages earned in the first four of the last five completed calendar quarters, but if the claimant lacks sufficient wages to qualify, then the SESA redetermines the claim based on the wages earned in the last four completed calendar quarters prior to the date the claim was filed. (*Id.*)

32. In 1990, four states, Minnesota, Ohio, Vermont, and Washington, used ABPs to redetermine monetarily [sic] eligibility if a claimant was found to be ineligible using the traditional base period. (Pl. Ex. 2 at 1.) By 1995, six states, Maine, Massachusetts, Ohio, Rhode Island, Vermont, and Washington, used ABPs to redetermine monetarily [sic] eligibility. (Pl. Ex. 21 at 3.) During 1995, two additional states, Michigan and New Jersey, enacted statutory provisions allowing for use of an ABP where a claimant is

found monetarily ineligible using the standard base period. (Mich. Comp. Laws Ann. § 421.45 (West 1995); N.J. Stat. Ann. § 43:21-19 (West 1995).)

33. Maine and Washington are the only two states using ABPs that were formerly wage record states. (Pl. Ex. 21 at 4.) The remaining states using ABPs were wage request states, and they adopted ABPs as part of the process of changing from wage request to wage record systems. (*Id.*) The ABPs were adopted because some claimants eligible under the wage request systems would be ineligible under the new wage record systems. (*Id.*)

34. Analysis of data from Maine, Massachusetts, Ohio, Rhode Island, Vermont, and Washington indicates that the use of an ABP increases the number of monetarily eligible claimants by six to eight percent. (*Id.* at 2.)

35. In February 1995, the Advisory Council on Unemployment Compensation, in a report to the President and Congress entitled, "Unemployment Insurance in the United States: Benefits, Financing, Coverage," recommended that all states "use a moveable base period in cases in which its use would qualify an Unemployment Insurance claimant to meet the state's monetary eligibility requirements." (Pl. Ex. 20 at 17.) The Advisory Council found that "advances in technology have made it feasible for all states to use the most recently completed quarter [i.e., the lag quarter] when determining benefit eligibility, and that using this quarter is consistent with the legislative requirement that states ensure full payment of Unemployment Insurance when due." (*Id.* at 16.)

V. [sic] *The Adoption of an APB* [sic] *in Illinois*

A. *Plaintiffs' Proposals for an ABP*

i. *Alternative I*

36. To implement an ABP system in Illinois, plaintiffs have proposed two alternatives.[6] (*See* Pl. Ex. 18.) Under Alternative I, if a claimant was monetarily ineligible using the standard base period, IDES would reconsider the claim using the last four completed calendar quarters. (*Id.* at 1.) If the claimant's wage information for the most recent quarter was not yet available on the IDES computer system, IDES would determine whether the claimant had earned at least $440 in the last three quarters of the standard base period (the "threshold test"). (*Id.* at 2.) If the claimant did not have sufficient earnings, IDES could immediately determine that the claimant could not qualify even if lag quarter wages were considered. (*Id.*) If the claimant passed the threshold test but his or her lag quarter wage information was not yet available, IDES would hold the claim until the wage information became available and then reconsider it. (*Id.*) If the claimant was then found to be eligible based on the lag quarter wages, IDES would pay benefits retroactive to the date the claim was filed. (*Id.*)

37. Under Alternative I, if the claimant's fourth quarter wages were not available, the length of time which the claimant would have to wait for IDES to redetermine his or her claim would depend upon how early in the filing quarter the claimant filed his or her claim. (*See id.*) Where the claim was filed during the first four

[6] The plaintiffs proposed a third alternative, the adoption of a wage request system, but they have acknowledged that its administrative costs would be significantly higher than for the other two alternatives while providing only marginally increased benefits. (Pl. Ex. 18 at 3-4.) As a result, they have not argued for the adoption of Alternative III.

to eight weeks of the filing quarter, it is likely IDES would either not have received or not have completed processing the employer's quarterly wage report. (*See id.*) As a result, a claimant filing early would have to wait longer for IDES to reconsider his or her claim using the ABP than a claimant filing late in the quarter. (*Id.*) However, lag quarter eligible claimants would still wait less time for benefits than under the present system. (*Id.*)

ii. *Alternative II*

38. Under Alternative II, if a claimant who filed in the first month of the quarter passed the threshold test but his or her fourth quarter wage information was not yet available, IDES would send a wage request to the claimant's employer. (*Id.*) Most wage requests would be returned within about three weeks. (*Id.* at 3.) Thus, under Alternative II, claimants filing in the first month of the quarter who require use of the ABP to be monetarily eligible would wait less time for benefits than under Alternative I. (*Id.*)

39. Alternative II requires more IDES staff and, therefore, it would be more costly to implement. (*See id.*) However, it would provide only marginally greater benefits to the plaintiffs. (*See* Tr. 89.)[7]

40. If IDES implements an ABP, it intends to include a "reachback" system in order to identify an undetermined number of members of the plaintiff class and pay them benefits they were denied under the present system, even though neither Alternative I nor II require it. (Def. Ex. 24 at 7.) IDES believes a reachback system is neces-

[7] "Tr." refers to the trial transcript, submitted as Def. Ex. 12.

sary because it cannot be certain that any new system would be in place in a timely manner, and thus it would have to pay retroactiv benefits for the period from the date the new system should have been operational to the date the new system is actually operational. (Def. Br. at 28-29.)

41. If IDES implements an ABP, a claimant's filing quarter wages will not be considered. (*See* Def. Ex. 24 at 4-5; *see also* Tr. 29.)

B. *The Benefits of an ABP to the Plaintiff Class*

42. The adoption of an ABP in Illinois will both speed payment of benefits to those claimants whose benefits are delayed under the present system and result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the present system. (Am. Final Pretrial Order, Stip. Facts, ¶ A.9.)

43. In 1986, IDES received 526,469 claims for unemployment insurance benefits. (*Id.*, ¶ B.3.c.) Of those, approximately 15,034 claims (of among 63,518 claims which were denied because the claimant lacked qualifying wages) would have been monetarily eligible if the wages earned in the lag quarter had been considered ("lag quarter eligible claimants"). (*Id.*). Of the lag quarter eligible claimants, about 9,500 filed a second claim for benefits. (Def. Ex. 7 at 3; Tr. 45). Approximately 8,997 of them had sufficient qualifying wages on their second claim; 701 were disqualified for other reasons. (Def. Ex. 6.) The remaining 5,592 did not file a second claim. (*Id.*)

44. Approximately 8,296 lag quarter eligible claimants received some benefits by filing a second claim, although some of them returned to work before receiving all the

benefits they would have if their first claim had been valid. (*Id.*) Using an ABP, these claimants would have received their benefits an average of forty-five days sooner than they did under the present system. (Tr. 70.)

45. In 1986, between about 13,800 and 15,034 lag quarter eligible claimants would have received about $8,500,000 in additional benefits if an ABP had been used. (Def. Ex. 2 at 2; Def. Ex. 6; Def. Ex. 7 at 1; Tr. 493, 506, 521.)

46. Of the claims filed in 1986, approximately 9,115 claims would have been monetarily eligible if the wages earned in the filing quarter had been considered ("filing quarter eligible claimants").[8] (Am. Final Pretrial Order, Stip. Facts, ¶ B.3.c.) Under an ABP system which considers lag quarter wages, filing quarter eligible claimants could file a valid claim three months sooner than they can under the present system. (Tr. 30, 70-71, 509.)

47. From October 1, 1992, to September 30, 1993, IDES received 100,744 ineligible claims, of which 22,057 were potentially eligible under an ABP. (Pl. Ex. 23 at 22.)

48. In 1994, the defendant, in a letter sent to SESA administrators in other states, estimated that use of an ABP in Illinois would increase the amount of benefits paid by the IDES by $30,000,000 to $40,000,000 annually.[9] (Pl. Ex. 22 at 2.)

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[8] Neither of the plaintiffs' proposals includes consideration of filing quarter wages in determining monetary eligibility. *See supra*, ¶ 42.

[9] This is the highest estimate provided by either side of the increased dollar amount of benefits to the plaintiff class using an ABP. IDES also estimated that use of an ABP in 1986 would have resulted in additional benefits paid out of just over $8,500,000. *See supra*, ¶ 46.

49. Analysis of data from the states using ABP's in 1995 indicates that benefits payouts have increased by approximately four to six percent. (Pl. Ex. 21 at 2.)

50. From 1980 to 1987, IDES averaged total benefits payments of $1,147,768,000. (Def. Ex. 2 at 1.)

C. *The Cost of an ABP to IDES*

51. Implementing either Alternative I or Alternative II would require complex changes to IDES' computer system. (Tr. 272.)

52. According to a 1994 study commissioned by the IDES, the cost of making the required changes to IDES' computer system to implement at ABP would range from $9,400,755 to $10,724,805 if all the work were done by outside vendors. (Pl. Ex. 24 at 8.) If IDES staff performed thirty percent of the work, the cost of an outside vendor would be reduced by $1,851,419. (*Id.* at 8-9.)

53. In 1990, IDES estimated that, to implement Alternative I, it would incur conversion costs of approximately $2,000,000. (Tr. 587.) In 1995, IDES estimated that implementing Alternative I would cost $5,863,347. (Pl. Ex. 26 at 4.)

54. In 1994, the defendant, in her letter to SESA administrators in other states, estimated that the cost to the IDES of adopting an ABP would be $2,000,000 in computer conversion costs and $200,000 to $300,000 per year in personnel costs. (Pl. Ex. 22 at 2.)

55. In 1990, IDES estimated that, to implement Alternative II, it would incur conversion costs of about $2,500,000. (Tr. 289.) In January 1995, in a study commissioned by IDES, it was estimated that implementing Alternative II would also cost between $8,400,000 and $9,300,000 in one-

time computer costs, and $80,000 per year in computer operating costs. (Pl. Ex. 24 at 9.) In late 1994, IDES estimated that one-time staff costs to implement Alternative II would be $4,047,357, and on-going annual staff costs would be $2,571,158. (Def. Ex. 24, Atts. B "Cost Calculations" and C "Cost Calculations.")

56. Based upon the additional staff required by the State of Washington to administer a system similar to Alternative I which was in use prior to 1993, IDES would require approximately fifty to sixty additional staff to administer Alternative I at a cost of at least $2,000,000 to $2,400,000 per year. (Tr. 570.)

57. It would take IDES approximately fifteen months to implement either Alternative I or Alternative II. (Tr. 289.)

58. Because IDES lacks sufficient staff to implement either Alternative I or Alternative II, consultants would have to be hired. (Tr. 288.)

59. IDES would have to re-train approximately two-thirds of its employees to operate the new system. (Tr. 283).

60. The federal government has, in the past, failed to fully fund IDES, although section 302(a) of the Social Security Act, 42 U.S.C. § 502(a), requires it to fund all administrative costs for state unemployment insurance programs. (Tr. 475.) From 1984 to 1990, there was a drop of about twenty-five percent in terms of "real" dollars funding for IDES. (*Id.*) Thus, if IDES implements an ABP, the State of Illinois is likely to bear the cost. (Tr. 490.)

61. Under state law, before IDES can incur the expenditures required to implement an ABP, a source of revenue must be identified first. (Tr. 487.) IDES is currently experiencing severe budget constraints, and funding to im-

plement an ABP would require cuts in IDES' current budget. (*Id.*)

62. IDES' staff has already decreased from approximately 3,000 in 1990 to just over 2,100 in late 1994. (Def. Ex. 23 at 2.)

VI. [sic] *Problems with an APB* [sic]

63. No state uses a "threshold test" as proposed in plaintiffs' Alternative I because all states require their SESAs to accept every claim filed. (Tr. 676.)

64. The Department of Labor requires SESAs to make eighty-seven percent of first payments within a minimum of either fourteen or twenty-one days of the end of the first compensable week, depending upon the state's system. (20 C.F.R. § 640.5; *see also* Pl. Ex. 25 at 8.)

65. Where a state uses only a standard base period system, the Department of Labor, in determining whether the state is paying unemployment insurance benefits "when due," does not count the twelve weeks of the lag quarter. (*See* Tr. 245.) Rather, it counts only the number of weeks in the filing quarter from the date the claim is filed until the date the first benefits payment is issued. (*Id.*) The Department of Labor ignores the lag quarter in determining timeliness because it considers the definition of base period an "eligibility requirement."[10] (*See* Def. Ex. 22.)

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[10] The Department of Labor's interpretation of section 237 and other states' standard base periods as "eligibility requirements" was rejected by the Seventh Circuit in this case. *Pennington v. Didrickson*, 22 F.3d 1376, 1386 (7th Cir. 1994). The Seventh Cir-

(Footnote continued on following page)

66. Where a state uses an ABP, the Department of Labor, in determining whether the state is paying unemployment insurance benefits "when due," counts all weeks from the date the claim is filed until the date the first benefits payment is issued. (*See* 20 C.F.R. § 640.5.)

67. Prior to 1993, the State of Washington used a system similar to Alternative I, in that, where a claimant's wages from the last completed quarter were not yet available, it would defer a decision on a claim until that information became available. (Pl. Ex. 21 at 28-29.) The Department of Labor informed Washington in 1992 that it was in violation of the "when due" clause. (*See id.* at 23, n.29.)

68. As a result, Washington changed its system for claims filed in the first month of the quarter. (*Id.* at 29.) For such claims, the claims office contacts the agency's local tax office to obtain missing wage information directly from employers and enter it into the quarterly wage reporting system. (*Id.*) Claims filed during the second and third months of the quarter are processed as before 1993. (*Id.*) For claims filed during the second and third months of the quarter, Washington gives priority in keypunching to ABP claims. (*Id.*) Using the employer's federal identification number and the claimant's Social Security number, the relevant hard copy quarterly wage report is lo-

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[10] *continued*
cuit held that section 237 is an administrative method, not an eligibility requirement. *Id.* at 1387.

On this basis, the plaintiffs have argued that IDES does not need to adopt the more expensive Alternative II with its wage request provision, because the Department of Labor's determination of timeliness is not the law in this circuit. However, we do not reach the issue of which alternative IDES must adopt. *Id.* at 1388.

cated, and the information pertaining to the claimant is keypunched immediately. (*Id.* at 29-30.) This system entails added administrative costs. (*Id.* at 30.)

69. The implementation of Alternative I is likely to affect IDES' timeliness in making first payments because a majority of claimants with ABP claims would have to wait six to ten weeks for their lag quarter wages to be posted. (Pl. Ex. 25 at 5.) As a result, the Department of Labor would likely find IDES in violation of the "when due" clause under that system. (Tr. 594; *see also* Pl. Ex. 21 at 32, n.44.)

Discussion

Section 303(a)(1) of the Social Security Act requires a state unemployment insurance program to provide for "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Under section 303(a)(1), the "when due" clause, a state must provide for such "methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

In this case, the Seventh Circuit has determined that the base period defined in section 237 is not an eligibility requirement, but rather is an administrative provision subject to the timeliness requirement of the "when due" clause. *Pennington v. Didrickson*, 22 F.3d 1376, 1387 (7th Cir. 1994).[11] Consequently, we must determine "whether

[11] The Seventh Circuit reversed our decision that section 237 is an eligibility requirement and remanded for a determination of whether it violates the "when due" clause. *Id.* at 1387-88.

section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Id.* at 1388. "To do so, it is necessary to decide whether section 237's base period 'strikes a reasonable balance' between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (quoting *Jenkins v. Bowling*, 691 F.2d 1225, 1230 (7th Cir. 1982)).

Both sides in this case have taken the position, at least implicitly, that the reasonable balance we are to strike involves weighing the additional benefits, both in dollars of benefits paid out and in numbers of persons eligible, which the plaintiffs would receive under an alternative system on the one hand against the cost to IDES of implementing and operating such a system on the other. Similarly, in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), the Seventh Circuit weighed the limited evidence of the additional benefits to claimants and the costs to IDES in invalidating section 602B of the IUIA. *Id.* at 1233. Hence, we think the parties' analysis is appropriate here, albeit with one addition: the increased promptness with which eligible claimants would receive benefits under an ABP. While, in this case, the Seventh Circuit also identified the prevention of fraudulent claims as a factor to be weighed in favor of IDES, *Pennington*, 22 F.3d at 1387, on remand, IDES has not argued that the adoption of an ABP would necessarily lead to an increase in fraudulent claims. Rather, it has asserted only that certain methods of implementing an ABP, such as wage affidavits executed by claimants, carry with them the possibility of increased fraudulent claims. Consequently, the prevention of fraudulent claims does not play a significant role in our analysis.

Thus, we weigh four factors to determine if section 237 strikes a reasonable balance. Three of them, namely, the number of additional eligible claimants, the amount in dollars of additional benefits paid out, and the increased promptness with which eligible claimants would receive benefits, inure to the benefit of the plaintiffs. The fourth, the cost to IDES to implement an ABP, weighs in favor of the defendant.

First, we consider the number of additional claimants who would be eligible under an ABP system. The parties stipulated that the adoption of an ABP in Illinois will result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the present system. *See supra*, ¶ 42. The evidence indicates that anywhere from 13,800 to 40,000 members of the plaintiff class would be eligible for benefits if an ABP which considered lag quarter wages were adopted. The lowest estimate of 13,800 additional eligible claimants is based upon IDES' estimate of the number of lag quarter eligible claimants in 1986; it represents an increase of 4.6 percent in the total number of eligible claimants for that year. *See supra*, ¶ 45. IDES also presented evidence estimating the number of additional eligible claimants at 22,000 for the period of October 1992 to September 1993. *See supra*, ¶ 47. The highest estimate of 40,000 additional claimants is an eight percent increase in the total number of eligible claimants in 1986; it is based upon analysis of data from the six states using ABP's, which suggests an increase of six to eight percent in the number of eligible claimants. *See supra*, ¶ 34. We find that even the lowest estimate of 13,800 additional eligible claimants represents a significant increase in the number of claimants who would receive benefits under an ABP. *See Jenkins v. Bowling*, 691 F.2d 1225,

1232 (7th Cir. 1982) (in 1979, fewer than 400 people adversely affected by section 602B of IUIA).

Next, we consider the amount in dollars of additional benefits IDES would pay out using an ABP. IDES estimated that, in 1986, it would have paid out an additional $8,500,000 in benefits if an ABP had been used. *See supra*, ¶ 45. However, in 1994, it estimated that an additional $30,000,000 to $40,000,000 per year in benefits would be paid out using an ABP. *See supra*, ¶ 48. And, analysis of data from the states using ABP's in 1995 indicates that benefits payouts have increased by approximately four to six percent. *See supra*, ¶ 49. From 1980 to 1987, IDES averaged total benefits payments of $1,147,768,000. *See supra*, ¶ 50. Four percent of this amount is approximately $40,000,000.

We find IDES' estimate of increased benefits paid out of $30,000,00 to $40,000,000 most credible, both because it is more recent than the 1986 estimate and because it is corroborated by analysis of data from the six states currently using ABP's. This is a *dramatic* increase in financial benefits to unemployed persons. As the Seventh Circuit noted in *Jenkins*, "One of the original purposes of the federal unemployment insurance program was to reduce the severity of the business cycle by maintaining the purchasing power of people laid off during a recession." *Id.* at 1232. It is beyond argument that an additional $30,000,000 to $40,000,000 in benefits would significantly affect the purchasing power of unemployed persons and thus would further this goal of the unemployment insurance program.

We consider now the increased promptness with which claimants would receive benefits under an ABP. The parties stipulated that the adoption of an ABP in Illinois will

speed payment of benefits to those claimants whose benefits are delayed under the present system. *See supra*, ¶ 42. Moreover, an ABP results in prompter payment of benefits to both lag quarter eligible and filing quarter eligible claimants. In the most extreme cases, such claimants will be eligible for benefits twelve weeks earlier than under section 237.[12] *See supra*, ¶ 46.

Finally, we consider the cost to IDES if it were to adopt an ABP. For this analysis, we have used only IDES' cost estimates, which are significantly higher than the plaintiffs'. We have done so for two reasons. First, although IDES' cost estimates may well be inflated, we find them more thorough and credible than the plaintiffs' estimates. The methodologies used by IDES, whether by its own staff or its expert, Michael Marshman, are more reliable and, we think, reflect with greater accuracy the complexity of converting IDES' current computer system to implement an ABP than the methodology used by the plaintiffs' expert, Peter Kauffman. We have also used IDES' estimates because using the highest cost estimates should demonstrate most clearly whether the costs outweigh the benefits to the plaintiffs.

IDES has estimated that it would incur one-time costs of nearly $13,500,000 for both computer conversion and additional staff and annual costs of almost $2,600,000 to implement an ABP. The one-time cost estimate is based upon IDES' estimate, in January 1995, that it would incur

[12] For some ABP-eligible claimants, such as those who return to work before receiving the maximum benefits available under the current system, prompter payment of benefits means additional dollars of benefits received, so the estimates of the total additional dollar amount of benefits to the plaintiff class include some benefits received as the result of prompter payment.

up to $9,300,000 in one-time computer conversion costs and its estimate, in late 1994, that it would incur one-time staff costs of $4,047,357, if it adopted plaintiffs' Alternative II. *See supra*, ¶ 55. The on-going cost estimate is based upon IDES' estimate, in January 1995, that it would incur $80,000 annually in computer operating costs and its estimate, in late 1994, that it would incur $2,571,158 annually in staff costs, to adopt Alternative II. *Id.* Moreover, IDES already operates under budgetary constraints and implementing an ABP system will impose even greater obligations on an already over-burdened agency. *See supra*, ¶ 61.

In sum, the evidence shows that between 14,000 and 40,000 members of the plaintiff class would likely receive an additional $30,000,000 to $40,000,000 per year in benefits and would receive their benefits sooner if an ABP were used, at a one-time cost of nearly $13,500,000 and an annual cost of almost $2,600,000 to IDES. The use of an ABP would significantly increase the number of claimants who would receive benefits, the speed with which benefits are paid, and the dollar amount of benefits paid. While the costs to IDES are undeniably significant as well, they are not so onerous as to outweigh the benefits to the plaintiffs. Given this, the benefits to the plaintiffs clearly outweigh the costs to IDES.

On this basis, we conclude that section 237 violates the "when due" clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible. IDES may not continue to use its current system simply to avoid the administrative costs it would incur by adopting an ABP. While, conceivably, increased administrative costs could be so great that they might demonstrate that an alternative system would not be administratively feasible, even the highest

cost estimates in this case do not support that conclusion here. Moreover, while we believe the exclusion of lag quarter wages was administratively necessary at one time because SESAs needed the lag quarter to compile employer wage report information, we are persuaded by the observation of the Advisory Council on Unemployment Compensation that "advances in technology have made it feasible for all states to use the most recently completed quarter [i.e., the lag quarter] when determining benefit eligibility." *See supra*, ¶ 35. At the present time, section 237 does not strike a reasonable balance between the plaintiffs' interest in prompt payment of benefits and IDES' interest in minimizing the costs of eliminating delay and in preventing fraudulent claims. Therefore, we hold that section 237 violates the "when due" clause.

Finally, the plaintiffs have requested that we order the defendant to submit an alternative to section 237 to us with reasonable promptness. However, as the Seventh Circuit made clear,

> The district court's sole task is to determine whether the current Illinois scheme is compatible with the 'when due' clause. It is not its responsibility to mandate an alternative. . . . It will be the prerogative of Illinois, not the district court, to determine the alternative.

Pennington, 22 F.3d at 1388. In our view, requiring the defendant to submit an alternative to this Court implies that we have the authority either to approve or reject it. We do not believe that we may properly exercise that degree of control over the defendant's efforts. Consequently, the relief we grant is limited to enjoining the defendant permanently from applying section 237 to the plaintiff class. This does not render this judgment enforceable [sic], however. We do retain jurisdiction so that, if the

plaintiffs believe that the method adopted by the defendant is inconsistent with this opinion, which could include a failure by the defendant to adopt an alternative within a reasonable time, they may request supplemental relief from this Court. *See Jenkins*, 691 F.2d at 1234.

Conclusion

For the forgoing reasons, we hold that section 237 of the Illinois Unemployment Insurance Act violates the "when due" clause of the Social Security Act. We grant the plaintiffs' motion for judgment and enter judgment in their favor. The defendant is hereby enjoined permanently from applying section 237 to the plaintiff class. This Court retains jurisdiction over this case to enforce this judgment. This order is final and appealable.

ENTER:

/s/ Honorable Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

DATED: February 1, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Case Number: 85 C 6327

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

Date October 21, 1992

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

[Dated October 21, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Luella Pennington, individually and on behalf of a class of applicants for Illinois unemployment insurance benefits, challenges the constitutionality of section 237 of the Illinois Unemployment Compensation Act ("IUCA"), Ill. Rev. Stat. ch. 48, ¶ 347 (1986). In that section, Illinois defines the "base period" used to determine whether a claimant is eligible for benefits as earnings during the "first four of the last five quarters."[1] This definition excludes from

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[1] Paragraph 347 states, in pertinent part, "For each benefit year beginning on or after November 1, 1981, 'base period' means the first four of the last five completed calendar quarters immediately preceding the benefit year." Ill. Rev. Stat. ch. 48, ¶ 347 (1986). "Calendar quarter" is defined as "the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31, or the equivalent thereof as the Director may by regulation prescribe." Ill. Rev. Stat. ch. 48, ¶ 348 (1986).

consideration earnings from the quarter immediately preceding the application. In Ms. Pennington's case, she could not meet the earnings levels required by the IUCA unless her earnings in the last quarter preceding her application were considered. Consequently, Ms. Pennington's application was denied, and she was required to wait an additional quarter and then to reapply. Upon re-application, Ms. Pennington was found eligible and was paid her unemployment benefits.

Ms. Pennington claims that Illinois, by using a base period of the first four of the last five quarters, violates a federal mandate requiring promptness in both eligibility determinations and benefits payments. Ms. Pennington asks for herself and others adversely affected that the Illinois base period be found unconstitutional under the Supremacy Clause of the United States Constitution.[2]

This Court held a week-long trial on the issue, and this Opinion will incorporate factual findings from that trial where appropriate.

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[2] The Supreme Court recently discussed the Supremacy Clause analysis in *Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 112 S. Ct. 2608 (1992):

> Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since our decision in *M'Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

112 S. Ct. at 2617.

The Social Security Act

As Judge Posner explained in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), the federal government, which partially funds the state unemployment compensation system, has "attached some strings to its largesse." *Id.* at 1226. Under section 303(a)(1) of the Social Security Act, the Secretary of Labor is required to make certain that a state's unemployment insurance law has methods of administration "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1) (1988). The regulations issued by the Secretary require "prompt determination of eligibility" and administrative methods that "will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible" and that are "reasonably calculated to insure full payment of unemployment compensation when due." 20 C.F.R. §§ 640.1(1)(2), 640.3(a), 650.1(b). Thus, the federal government, in return for footing part of the bill, requires the state to (a) determine eligibility promptly, and (b) pay full benefits promptly after that determination—as a mandate roughly akin to the notion of all deliberate speed.

Conversely, the Social Security Act and its regulations do not dictate or attempt to control the state's eligibility requirements. *Ohio Bureau of Employment Sec. v. Hodory*, 431 U.S. 471, 486-87 (1977). In *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court noted, "[T]he voluminous history of the Social Security Act [makes] it abundantly clear that Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." Consequently, a state has the exclusive and unfettered right to determine who receives benefits and how much those benefits will be without interference

from the federal government. The state must only make its eligibility determination and its benefit payments promptly.

The Illinois Unemployment Compensation Scheme

Illinois has developed a statutory scheme to determine eligibility for benefits which rests on two pillars—wage reporting and a certain minimum amount of earnings during a "base period." A similar scheme is utilized by approximately forty other states. According to the facts undisputed by the parties, under Illinois' wage reporting system, each employer within the state is required to report the wages paid to employees in each calendar quarter. That report must be filed within thirty days of the end of each quarter.[3] The employer's report is then incorporated into Illinois' computer system—a process which takes approximately two weeks. Thus, assuming a timely filing by the employer and normal administrative action by the state, an employee's earnings for any particular quarter are available to the Illinois unemployment offices six weeks after the end of that quarter. The earnings information is the basis from which the state is able to verify an applicant's eligibility for benefits.

To be monetarily eligible for unemployment benefits in Illinois, a claimant must have earned a minimum of $1,600 during the first four calendar quarters of the base period. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). The total of $1,600 must come from earnings in at least two of those

[3] Considering that some employers may be a few days late and that a few days may be needed for mail delivery as well, in some cases Illinois may not be in possession of the reports for approximately forty days.

four quarters and at least $440 must have been earned in a quarter other than the quarter with the greatest earnings. *Id.* For example, $440 in one quarter and $1,160 in another would meet the minimum eligibility requirements.

However, Illinois, in determining whether the claimant has the minimum earnings, has a base period of the "*first four of the last five quarters*" which precede the filing of the claim. Ill. Rev. Stat. ch. 48, ¶ 347 (1986). This is the provision which Ms. Pennington's class challenges. Under this scheme, an applicant who files in the sixth quarter is not entitled to have earnings from the fifth quarter counted in the determination of his or her monetary eligibility. The fifth quarter is referred to as the "lag quarter." Schematically, then, the base period looks like this:

Base Period

1st Quarter	—	earnings considered
2nd Quarter	—	earnings considered
3rd Quarter	—	earnings considered
4th Quarter	—	earnings considered
5th Quarter	—	lag quarter (earnings not considered)
6th Quarter	—	claim filed

Thus, if a claimant had earned nothing in the first two quarters, $440 in the third quarter and $1,160 in the fourth quarter, he would be eligible if he applied for benefits in the sixth quarter. Similarly, if a claimant had earned $440 in the third quarter, $1,160 in the fourth and a significant amount in the fifth, he would still be eligible. However, if the claimant had earned nothing in the first, second, and third quarters, $600 in the fourth, and $2,000 in the fifth quarter, he would be ineligible if he applied

in the sixth quarter. He would remain ineligible until he refiled in the next (or seventh) quarter, when the sixth quarter would become the "lag quarter" as follows:

	Base Period
1st Quarter[4]	— $0
2nd Quarter	— $0
3rd Quarter	— $0
4th Quarter	— $600
5th Quarter	— $2,000
6th Quarter	— lag quarter (ineligible for benefits)
7th Quarter	— claim filed

Approximately three percent of the claimants for unemployment benefits in Illinois are ineligible for benefits using the first four of the last five quarters but would be eligible if earnings from the fifth quarter (the "lag quarter" immediately preceding the filing of their claim) were counted.[5] The plaintiff class claims that the Illinois base period, by excluding earnings from the "lag quarter," requires many claimants to wait an unreasonable period of time before

[4] Under Illinois' definition of base period, of course, this first quarter would not be counted, as it is not one of the last five quarters before the benefit year. *See* Ill. Rev. Stat. ch. 48, ¶ 347 (1986).

[5] At trial, we considered the claims in 1985. The evidence presented showed that in that year, out of some 195,000 claims for unemployment compensation, approximately 15,000 were by individuals who needed their earnings from the immediately preceding quarter to be eligible for benefits. All were found ineligible at the time of their initial application. Some 8,000 reapplied in the following quarter and obtained benefits.

obtaining benefits for which they were actually eligible at the time of their initial application.

Under the Illinois scheme, the length of the delay an applicant experiences in receiving benefits depends upon when his or her claim is filed. If the claim is made early in the sixth quarter, the delay might be a full ninety days. If the claim is made at the end of the sixth quarter, the delay might be less than a week. From the evidence adduced at trial, it appears that the average delay is approximately six weeks.

Part of the delay is inevitable under Illinois' wage-reporting system because of the administrative time the state needs to compile and process the necessary information. If the fifth quarter earnings are needed to determine eligibility, the state must wait for the employers' reports, which are not due until thirty days after the quarter ends. Further, the state requires two additional weeks after receipt of the reports to process them into the state-wide computer system. Viewed in this light, a minimum time period in the sixth quarter of approximately forty-five days (or about six weeks) is required for Illinois to verify eligibility even if fifth quarter earnings are counted.

Thus, earnings for members of the plaintiff class who file in the second half of the sixth quarter would be reported and available on the state's computer system at the time the class members initially applied for benefits. Thus, the state should require minimal additional administrative time to process their claims. Nevertheless, these applicants (as well those who applied earlier in the quarter) are all required to wait and reapply at the beginning of the seventh quarter. As developed at trial, claimants who need the earnings from the lag quarter in order to meeting the required earnings levels experience an average

delay of four weeks before they become eligible for benefits.[6] Ms. Pennington claims this delay violates the Social Security Act's requirements of prompt determination of eligibility and payment of benefits.

Eligibility Requirement or Unreasonable Delay?

Defendant Sally Ward, Director of the Illinois Department of Employment Security, argues that the so-called "delay" in determining eligibility and receipt of payment is no such thing. Rather, in the state's view, Ms. Pennington and claimants similarly situated are simply ineligible when they apply during the sixth quarter. Thus, there is no delay in "determining eligibility," which is what § 303(a)(1) prohibits. There is also no delay in paying benefits when due because benefits do not become due until the claimant files a new application in the next quarter. Put another way, the Director contends that the Illinois base period is a legitimate eligibility requirement which defines the earnings considered in determining whether benefits are due. States are free to create their own unemployment compensation plans and to define their own eligibility requirements. *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977); *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982). According to Ms. Ward, Illinois has chosen to use the first four the last five quarters as its base period to determine eligibility. Since this is an eligibility requirement (just like the $1,600 in wages), the state is free to use any yardstick it wishes.

---

[6] We conclude that the average delay is four weeks based on the proposition that one-half of the claimants would apply on the fiftieth day of the sixth quarter. The remaining half would apply over the next forty days of the quarter.

Ms. Pennington disagrees. She maintains that the base period is not an eligibility requirement at all. Instead, she argues that eligibility turns on earnings of $1,600 in a span of four quarters, at least $440 of which must have been earned in a quarter other than the quarter with the greatest earnings. Thus, a base period which does not permit a claimant to count earnings from the final quarter preceding his claim is simply a method of delaying the determination of eligibility. Ms. Pennington points out that at the time of her claim for benefits, she had done everything else necessary to receive benefits. She had earned the statutorily required amount, but because part of it came in the "lag quarter," she was required to wait approximately forty-five days and then to reapply for benefits. In essence, she argues, the base period which pretends to define eligibility in reality acts to delay the eligibility determination. Consequently, Ms. Pennington argues, Illinois' base period is a "wolf in sheep's clothing."

To resolve this issue, we must determine whether the Illinois base period, with its lag quarter, is a true eligibility requirement. If so, the Director must prevail, because Congress has left eligibility requirements to the sound discretion of the states. In *Ohio Bureau of Employment Security v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court concluded that "[n]othing in *Java*[7] purported to define the class of persons eligible for benefits. The Court's sole concern there was with the treatment of those who had already been determined under state law to be eligible." And in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court found that, "Congress intended the several

[7] *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

states to have broad freedom in setting up the types of unemployment compensation that they wish." Our own circuit in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), has recognized that the claimant must meet the state's eligibility criteria. *Id.* at 1229.

Illinois has established several eligibility requirements. The claimant must have earned a minimum of $1,600 during the first four of the last five quarters preceding his application for benefits. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). At least $440 of the $1,600 must have been earned in a quarter other than the quarter with the largest amount of earnings. *Id.* These requirements, among others, establish who is eligible to receive benefits.[8] *See, e.g.*, Ill. Rev. Stat. ch. 48, ¶ 403, 420 (1986).

We conclude that the lag quarter is in fact a valid eligibility requirement. Ms. Pennington, who applied for benefits in the sixth quarter and who needed to include her earnings from the fifth or "lag" quarter to qualify, was simply ineligible for benefits at the time of her application. There is no dispute that Ms. Pennington and claimants similarly situated are promptly found to be ineligible when they apply for benefits during the "lag quarter." They are advised that they may reapply in the next quarter and at that time, if they are still out of work, their benefits are promptly found to be due and are promptly paid. Viewed in this light, computing the earnings necessary for eligibility based on the "first four of the last five

[8] Illinois has also established a number of bases for disqualification of an otherwise eligible claimant, including, among other things, voluntarily leaving employment, discharge for misconduct, refusal of work, unemployment due to a labor dispute, receipt of other unemployment benefits and receipt of workers compensation benefits. *See* Ill. Rev. Stat. ch. 48, ¶¶ 431-36 (1986).

quarters" is an eligibility requirement which Illinois may properly utilize in its discretion.

The lag quarter, as an eligibility requirement, does not result in a delay in the payment of benefits to which a claimant is in fact entitled. When a claimant applies in the sixth quarter, he or she is not entitled to the retroactive payment of any past benefits based on the first, invalid application; he or she is entitled only to benefits from the time of the second, valid claim. In the event the claimant finds work between filing the first application during the "lag quarter" and the beginning of the following quarter, he or she will be unable to claim any benefits at all. There is no delay in either the determination of benefits or payment of benefits when due.

Under this analysis, *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and *California Department of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), are inapposite. In both cases, the state had made an initial determination that the claimant was eligible (in *Java* at a preliminary hearing[9] and in *Jenkins* at the time of application[10]), but the claimant was subsequently disqualified. Consequently, otherwise eligible claimants had to wait for the completion of other proceedings, causing an indefinite delay or interruption in their receipt of benefits, to see if their eligibility for those benefits was permanently lost. Here, in contrast, Ms. Pennington and similarly situated applicants are simply ineligible when they make their initial applications.

Ms. Pennington argues that this is a distinction without a difference. She points out that in both *Jenkins* and

[9] 402 U.S. at 127-28.

[10] 691 F.2d at 1229.

Java, the state legislatures could have written the challenged provisions of the statutes to provide that when an additional procedure is required to determine eligibility, the claimant is simply denied benefits until the claims are finally resolved. However, we are not persuaded by this analysis. In *Jenkins*, the statute clearly provided that the eligibility was "held in abeyance pending the result of any legal proceedings arising therefrom." 691 F.2d at 1227. *See* Ill. Rev. Stat. ch. 48, ¶ 432(B) (1986). There, of the total number of claimants affected by the provision at issue, thirty-nine percent were later found to be eligible and were paid benefits retroactive to the date of their initial applications. *Id.* at 1229. This was the basis of the Seventh Circuit's finding in *Jenkins* that the disputed provision constituted an unjustified delay. Here, by definition, no claimant is even eligible in the sixth quarter if he must include fifth quarter earnings in order to meet the earnings levels requirement. This distinction is a substantive difference.

We recognize that the Illinois base period (with its lag quarter) results in a delay in the payment of benefits for those claimants who (1) need earnings from the lag quarter to qualify, and (2) remain unemployed until the following quarter. That delay can be as short as a few days or as long as three months. So we must consider whether the delay is administratively justifiable. In *Jenkins*, Judge Posner wrote:

> Of course [a claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment.
>
> . . . .
>
> If Illinois had good reason to postpone the payment of benefits to these people, then bearing in mind that the state has a legitimate interest in enforcing its

> valid eligibility criteria and minimizing its administrative expenses, we would not regard section 303(a)(1)—which only requires administrative methods "reasonably calculated" to ensure prompt payment—as a bar to postponement. But postponement must not be unreasonable.

Jenkins, 691 F.2d at 1229. Since the delay which concerns us results from the inclusion of the lag quarter in the base period, we must look to the length of, and the reasons for, the lag quarter.

As discussed earlier, Illinois is a wage reporting state. Under the administrative procedure described above (*see supra* at 4-5), Illinois needs about six weeks after the close of any quarter before it can verify an applicant's entitlement to benefits based in part on earnings in that quarter. Since Illinois has a legitimate interest in preventing ineligible individuals from receiving compensation, its use of the first six weeks of the quarter for verification is a legitimate administrative purpose. Consequently, the earliest time at which a claimant could expect payment would be after this administrative process has been completed, that is, during the last seven weeks of the quarter. The evidence presented at trial indicates that the class Ms. Pennington represents experiences an average delay of about four weeks after the state has completed its administrative process, or about ten weeks after the start of the quarter.[11]

We conclude that Illinois' inclusion of the lag quarter as an eligibility requirement does not violate the state's

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[11] A member of the plaintiff class could file for benefits in the beginning, middle or end of the sixth quarter. Thus, one class member could experience a delay of eighty-nine days while another a delay of only a few days.

duty to ensure that payment is made as soon as "administratively feasible." *Java*, 402 U.S. at 121. A "lag" period has been part of Illinois' statutory scheme since 1955.[12] In fact, for claims beginning in November 1981, the "lag" period was shortened from "not less than four months" to one calendar quarter.[13] While the allowance of an entire quarter for administrative purposes does not reflect precisely the amount of administrative time the state actually needs at present, we find that it does not constitute an "indefinite delay." *See Jenkins*, 691 F.2d at 1229. It is undeniable that changes in technology since the current provision was enacted twelve years ago mean that, if Illinois had state-of-the-art computer hardware and software, it could process earnings information more quickly, but this fact does not render unreasonable the legislature's selection of one calendar quarter for administrative processing. We do recognize, however, that under certain circumstances an antiquated processing system could function so poorly as to create an unreasonable delay where reasonable alternatives exist. *See, e.g., Burtton v. Johnson*, 538 F.2d 765, 770 (7th Cir. 1976) (staffing and funding problems not satisfactory explanations of failure to make benefits payments promptly) (citing *Cornelius v. Minter*, 395 F. Supp. 616, 621 (D. Mass. 1974)). But the inclusion of the "lag quarter" as administratively necessary does not constitute such a circumstance.

---

[12] *See* Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

[13] Previously, the base period for benefit years beginning prior to November 1, 1981 was "the four consecutive calendar quarters ending not less than four months nor more than six months prior to the month in which the benefit year began." Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

Conclusion

For the reasons set forth above, we hold that definition of "base period" set forth in section 237 of the Illinois Unemployment Compensation Act, Ill. Rev. Stat. ch. 48, ¶ 347 (1986), is a valid eligibility requirement for unemployment benefits and does not violate the Supremacy Clause of the United States Constitution. Consequently, we enter judgment in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

ENTER:

/s/ Paul E. Plunkett
United States District Judge

DATED: October 21, 1992

ORIGINAL

No. 97-58

Supreme Court, U.S.
FILED
SEP 5 1997
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

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Pursuant to Sup. Ct. R. 39, Luella Pennington, moves to file her Brief in Opposition to the above-captioned Petition for Writ of Certiorari in forma pauperis. In support thereof, Ms. Pennington offers the attached declaration evidencing her financial status and states that:

1. She represents a class of unemployment insurance claimants in Illinois;

2. On July 7, 1985, she moved to file this action in forma pauperis in the United States District Court for the Northern District of illinois. That motion was granted on July 19, 1985;

3. From 1985, when the case was filed, until July 31, 1996, Ms. Pennington was represented by attorneys employed at the Legal Assistance Foundation of Chicago ("LAFC"), a legal services organization. Mr. Jeffrey B. Gilbert, one of the attorneys who has represented Ms. Pennington in this matter since it was filed has been a partner at Johnson, Jones, Snelling, Gilbert & Davis, P.C. since September 16, 1994, but was employed at LAFC for fifteen years prior thereto, and he remained as counsel to Ms. Pennington and the class in this case since his departure from LAFC;

4. Robert E. Lehrer has also represented Ms. Pennington since the case was first filed. He was employed at LAFC for 23 years until March 1996 when he became a partner in Lehrer & Redleaf. Since his departure from LAFC, Mr. Lehrer has remained as counsel to Ms. Pennington and the class in this case;

5. LAFC withdrew from representation of Ms. Pennington on July 31, 1996 pursuant to Section 504(a)(7) of Public Law 104-134, which barred federally funded legal services programs such as LAFC from "participat[ing] in a class action lawsuit" after August 1, 1996. Since LAFC's withdrawal, Messrs. Gilbert and Lehrer have continued to represent Ms. Pennington in this matter.

WHEREFORE, Respondent requests that this Court permit her to proceed in forma pauperis.

Respectfully submitted,

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No. 97-58

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLITA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

DECLARATION IN SUPPORT OF MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I, Luella Pennington, state that I am the Respondent in the above-entitled case; that in support of my motion to proceed in this matter without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefore; that I believe I am entitle to redress; and that I desire to respond to the Petition for Certiorari filed by Lynn Q. Doherty ("Petition") and to otherwise defend the Court of Appeals' decision should this Court grant the Petition.

I further state that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to Petition are true:

1. Are you presently employed?

Answer: No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer: I was last employed part-time in September 1986 when I earned approximately $4.00 per hour for 20 hours per week, and I received some additional unemployment insurance benefits for a total of approximately $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No

3. Do you own any cash or checking or savings account?

Answer: Yes

a. If the answer is yes, state the total value of the items owned.

Answer: I have a checking account (No. 10000655084) at Merchandise National Bank in Chicago, Illinois. I receive a monthly Social Security

check in the amount of $507. I have approximately that amount, though sometimes a little more, in the account. When a check is deposited, I spend it down through the month until the next check arrives. I also receive $42 in food stamps every month.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. If the answer is yes, describe the property and state its approximate value?

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: I have no dependents other than myself.

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury; and I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 21, 1997

Ms Luella Pennington

Ms. Luella Pennington

No. 97-58

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Until August 5, 1997, section 303(a)(1) of the Social Security Act, 42 U.S.C. §503(a)(1) (the "when due" clause), unequivocally required that state unemployment insurance laws include "methods of administration ... reasonably calculated to insure full payment of [benefits] when due." In Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) ("Pennington I"), App. 16-39, cert denied, 513 U.S. 1032 (1994), the court of appeals held that section 237 of the Illinois Unemployment Insurance Act, 820 ILCS 405/237 ("section 237") defines a "method of administration" within the meaning of the "when due" clause and remanded the case for "factual findings and a determination of the issue of section 237's compliance with the 'when due' clause and corresponding regulations." Id. 37-39. On remand, the district court issued extensive findings of fact and held that section 237 violated the "when due" clause. In Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1997) ("Pennington II"), the court of appeals affirmed the district court's judgment.

On July 3, 1997, the Director of the Illinois Department of Employment Security ("Director" of "IDES") filed a petition for certiorari, no. 97-58 which sought review of whether the court of appeals in Pennington I correctly held that section 237 defines a "method of administration" within the meaning of the "when due" clause; and whether, on remand, the district court correctly applied the rule of law enunciated in Pennington I.

On August 5, 1997, however, the President signed of the Balanced Budget Act of 1997, Pub.L. 105-33, 111 Stat. 251. Section 5401 of that statute ("the anti-Pennington provision") provides that:

> Section 1. Clarifying Provision.
>
> (a) In General. - No provision of a State law under which the base period for such State is defined or otherwise determined shall, for purposes of section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)), be considered a provision for a method of administration.
>
> (b) Definitions. - For purposes of this section, the terms "State law", "base period", and "State" shall have the respective meanings assigned to them under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).
>
> (c) Effective Date. - This section shall apply for purposes of any period beginning before, on, or after the date of the enactment of this Act.

On September 5, 1997, the Director filed a supplemental petition for certiorari asking that the Court either summarily reverse the Pennington decisions or grant the Director's petition, vacate the court of appeals' judgment and remand for further consideration in light of the anti-Pennington provision.[1] That question is now presented to this Court.

---

[1] By letter dated August 4, 1997, this Court's Chief Deputy Clerk, Francis J. Lorson, extended the date for filing this brief until September 6, 1997. To allow us to meet that deadline, the Director's counsel sent as a draft of the Director's supplemental petition before it was filed, and said that they would file it, by mail, on September 5, 1997. We appreciate their courtesy in doing so.

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STATEMENT OF THE CASE

I. Nature Of The Action

Respondent, Luella Pennington, and the members of the class she represents, are claimants for unemployment insurance. They brought this case against the Director of the Illinois Department of Employment Security ("Director" of "IDES") to challenge one aspect of the definition of "base period" found in section 237 Illinois Unemployment Insurance Act ("section 237" of "IUIA"), 820 ILCS 405/237. The "base period" is the time within which claimants must have earned sufficient wages to qualify for unemployment insurance benefits. The claimants argued that, by giving rise to an unnecessarily long "lag period" (as described at p. 6 infra), section 237 delays payment of benefits in violation of the "when due" clause, which requires that a state's unemployment insurance law provide for "methods of administration ... reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

In her original petition, the Director sought review of the two appellate court decisions in this case. The first of those decisions, Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) ("Pennington I"), App. 16-39[2], held that section 237 was subject the constraints of the "when due" clause. As respects Pennington

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[2] The claimants cite to: the Appendix bound with the Petition For Writ of Certiorari (App."); the Petition itself ("Pet."); the Director's Petition For Writ of Certiorari in No. 94-592 ("1994 Pet."); portions of the record transmitted to the Court of Appeals, including documents recorded on the district court's docket ("R."), the trial transcript ("Tr.") and plaintiff's and defendant's trial exhibits ("P.Ex." and "Def. Ex."); and the Respondents' Appendix ("Resp. App."), which is bound with this brief.

I, the Director's petition is virtually identical to one the Director filed in 1994, which this Court declined to grant. Compare Pet. at 3-16 with Petition For Certiorari in No. 94-592 at 4-15; see 513 U.S. 1032 (1994) (denying certiorari).[3] Yet the Director did not even suggest reasons why this Court should grant the writ to review Pennington I, when it would not do so three terms ago.

The Director's original petition also sought review of Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1990) ("Pennington II"), App. 1-15, which affirmed the trial court's resolution of the factual inquiry the Pennington I panel had instructed it to make. See Pet. at 17-21. In that respect, however, the petition asked this Court "to review evidence and discuss specific facts", United States v. Johnston, 268 U.S. 220, 227 (1925), despite the admonition in S. Ct. Rule 10 that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10, 28 U.S.C. ("Rule 10").

Moreover, the original petition did not specifically invoke even one of the reasons Rule 10 sets forth as "indicat[ive]" of the type of "compelling reasons" that must be present to warrant an order granting certiorari. Indeed, the Director acknowledged that neither Pennington I nor Pennington II presents any conflict with the decision of any other federal appellate court or any state

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[3] A typographical error in the Director's petition incorrectly cites the 1994 denial of certiorari as appearing at Volume 573 of the U.S. Reports. Pet. at 1.

court of last resort. Pet. at 8 (Pennington I was a decision of "first impression"); id. at 17-22 (criticizing Pennington II, but not arguing that the ruling presents a decisional conflict within the meaning of Rule 10(a)). Similarly, the Director implicitly acknowledged that neither Pennington I nor Pennington II "decided an important question of federal law that conflicts with relevant decisions of this Court." S.Ct. Rule 10(c); see Pet. at 13, 14, 19, 21 (urging that the court of appeals' reliance on various rulings of this Court was misplaced, but not that the decisions in Pennington I or Pennington II transgressed any such ruling).

Thus, despite the filing of the original petition, Mrs. Pennington and the class had every reason to expect that, after twelve years of litigation, this case would soon end with a judgment in their favor. But the State of Illinois and other sympathetic states then appealed to Congress to overturn Pennington I. That appeal included a request that Congress not be restrained by any "intellectual exercise." Statement by Day Gilbert ("Gilbert Stmt.") at 5, Resp. App. 25. Congress accommodated that request by enacting section 5401 of the Balanced Budget Act of 1997, Pub.L. 105-33, 111 Stat. 251, (the "anti-Pennington provision").

The anti-Pennington provision is the enactment of a lie, and an expression of the government's willingness to gut the most critical public policies that protect our poorest fellow citizens. See pp. 16-28 infra. We appreciate, however, that "judgments about the wisdom of ... [the anti-Pennington provision] remain within the exclusive province of the legislative and executive branches."

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). And though, by its terms and as confirmed by the legislative history, the statute was expressly designed to overturn the decision in Pennington I retroactively, this Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Gray, 467 U.S. at 729-30 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976) (citations omitted)). Accordingly, retroactive legislation is not unconstitutional so long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." Id. at 730. We therefore acknowledge at the outset that the anti-Pennington provision eviscerates the claimants' litigation position.

After twelve years of litigation, however, and on the verge of, what we believe, would have constituted important relief, we take the opportunity this Court provides to file a brief in opposition to the Director's petitions, to set the historical record straight as to the realities of Congress's and the President's decisions to subvert the nation's unemployment insurance program so as to undermine a judgment that was critically important to America's poorest workers.

II. Statement Of Facts

The Director herself, or her predecessors in interest, stipulated to most of these facts in the trial court, in the Stipulation of Fact ("Stip."). See Resp. App. at 1-20.[4]

A. The Operation Of Section 237 Of The Illinois Unemployment Insurance Act

In Illinois, an eligible claimant can draw regular unemployment insurance benefits during her "benefit year," which is the one-year period beginning with the Sunday of the week in which she first files a "valid claim" for benefits. 820 ILCS 405/242; Stip. ¶ A.3, Resp. App. 2; Pennington I, App. 18. To file a "valid" claim, however, a claimant must have earned sufficient wages during a year period called the "base period."[5] 820 ILCS

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[4] The citations to Illinois statutes in the stipulation are to "Illinois Revised Statutes" ("Ill. Rev. Stat."), a prior codification of Illinois law that has been replaced by "Illinois Consolidated Statutes" ("ILCS").

[5] To be eligible for benefits, a claimant must have earned at least $1600 during the whole "base period" and at least $440 outside the calendar quarter in which (s)he earned the most wages. 820 ILCS 405/500.E; see Stip. ¶ A.1, Resp. App. 1, Pennington I, App. 18, n. 1. We call this the "earnings requirement."

Whether a claimant has sufficient wages in his base period is resolved by a "finding" issued pursuant to Section 701 of the IUIA. 820 ILCS 405/701; see Stip. ¶ A.2, Resp. App. 1. If a claimant is monetarily eligible, he is said to have filed a "valid claim." 820 ILCS 405/242, 405/500.E; see Stip. at ¶ A.2, Resp. App. 1, Pennington I, App. at 18.

That a claimant has filed a valid claim does not necessarily mean that (s)he will receive benefits, however, because (s)he can be disqualified based on a non-monetary "determination" issued pursuant to section 702 of the IUIA, 820 ILCS 405/701; see Stip. at ¶ A.2 n. 4, Resp. App. 2, when, for example, the claimant was "discharged for misconduct connected with work" or "voluntarily le[ft] work without good cause attributable to the employ[er]." See 820 ILCS 405/601, 405/602.

405/242, 405/500.E.; see Stip. ¶ A.1, Resp. App. 1, Pennington I, App. 18.

The claimants challenged section 237's definition of the base period because it included only "the first four of the last five completed calendar quarters immediately preceding the benefit year" (the "section 237 base period"). 820 ILCS 405/237; see Stip. ¶ A.4, Resp. App. 2, Pennington I, App. 16-18. By that language, section 237 skips both the calendar quarter in which the claimant files his claim (the "filing quarter") and the preceding calendar quarter (the "lag quarter"). See Stip. ¶ A.5, Resp. App. 2, Pennington I, App. 18; Tr. 16-19. Consequently, when IDES determines whether a claimant has sufficient wages to qualify for benefits, it disregards any wages earned by the claimant in both the filing and the lag quarters (the "lag period"). Id.

Because of section 237, a claimant who lacks sufficient wages in the first four of the last five completed calendar quarters prior to his claim is ineligible for benefits when he first becomes unemployed, even if he would have sufficient wages if his earnings in the lag or filing quarter were counted toward eligibility. Stip. at ¶ 6, Resp. App. 3. But if such a claimant simply waits until his most recent wages fall into the first four of the last five calendar quarters as defined by a later-filed claim, he becomes eligible for benefits. Stip. at ¶¶ 7-8, Resp. App. 6.

Thus, the Director wrongly asserts that the class consists of "claimants who are monetarily ineligible for benefits and who seek eligibility status by including their earnings that fall outside

section 237's base period." Pet. at 5. To make that assertion, the Director must ignore two of her own stipulations: the stipulated class definition, which confirms that class members are claimants who were denied "solely because part of all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of section 237 of the Act", Stip. at ¶ B.3.a; Resp. App. 6 (emphasis supplied); and the stipulation that wages that IDES initially disregards because they fall in a claimant's lag period, become qualifying wages by the passage of enough time so that they fall within the section 237 base period defined by the date of a claimant's second, later-filed claim. Stip. at ¶¶ A.7 and 8, Resp. App. 3. In short, though IDES treats class members as monetarily ineligible when they first apply for benefits, those claimants become monetarily eligible by doing nothing more than waiting until sufficient time has passed, after which they can file a second, valid claim.

B. The Reason Section 237 Delays Payment Of Benefits: Wage Record, Wage Request, And Movable Base Period Systems

Just as the Director ignores the fact that section 237 delays adjudication of eligibility, she ignores the reason why it does so. States have used one of three systems for compiling wage data. See Stip. ¶ C.1-6, Resp. App. 7-9. The most common system, and the one used in Illinois, is the wage record system. Stip. at ¶ C.2, Resp. App. 7-8; Tr. 23. Until recently, many states used wage request systems, Stip. at ¶ C.4, Resp. App. 8, but none still does so. Some states now use "movable" or "alternative" base periods

("ABP"). Stip. at ¶ C.6, Resp. App. 9; P. Ex. 2.[6]

Under a wage record system, employers covered by the state's unemployment insurance statute report gross wages of all their employees to the state unemployment security agency ("SESA") on a quarterly basis. Stip. at ¶ C.3, Resp. App. 8; Tr. 12, 16. In contrast, under wage request systems, wage information was not requested of a claimant's employer until the claimant applied for benefits, when his wages were required to adjudicate his claim. Stip. at ¶ C.4., Resp. App. 8; Tr. 11-16.

A wage record system is characterized by the existence of a gap called the lag period, which falls between the end of a claimant's base period and the beginning of that claimant's benefit year. Stip. at ¶ C.3, Resp. App. 8; Tr. 15-20. The Director has admitted that, in wage record states, "[t]his gap is necessary because time is required for employers to report wages to the SESA and for the SESA to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." Id.; see Pennington I, App. 36. In contrast, SESAs in wage request states could request the most recent wage information for each claimant. Stip. at ¶ C.5, Resp. App. 8; Tr. 15-16. Accordingly, in wage request states, there was no need for a gap between the end of the claimant's base period and the benefit year. Id.; Tr. 13-20.

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[6] The district judge used the term "ABP". See App. 50-51 (explaining operation of an APB). In its first opinion, the court of appeals used the term "movable base period." See App. at 22 n. 3. In the second opinion, the court of appeals used the "ABP". App. at 4. The claimants use both terms in this brief.

A movable base period system retains certain advantages of a wage record system while minimizing the delay that is experienced, because of the lag period, by those claimants who need their most recent wages to qualify for benefits. See Stip. ¶ C. 6.; Resp. App. 9; Tr. 27. Under an ABP, the state uses a section 237 base period except that, when an applicant has insufficient qualifying wages in that base period, the SESA promptly redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim.[7] Id.

C. Luella Pennington And The Class Members

Luella Pennington applied for unemployment insurance on June 7, 1984, and thereby created a base period from January 1, 1983 to December 31, 1983. Stip., ¶ B.2.b; Resp. App. 5. Pursuant to section 237, the first and second calendar quarters in 1984 were not in her base period, because those were her lag quarter and filing quarters, respectively. Stip. at ¶ B.2.b.-d; Resp. App. 5-

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[7] Under most ABPs, when an applicant has insufficient qualifying wages in the section 237 base period, the SESA redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim. Finding no. 31, App. 50; see Me. Rev. Stat. Ann. tit. 26, § 1043; Ohio Rev. Code Ann. § 4141.01(Q); R.I. Gen. Laws § 28-42-3(10); Wash. Rev. Code § 50.04.020; Tr. 25-27; Mich. Comp. Laws §§ 421.45 and .75. Four states move the base period to include filing quarter wages earned prior to the claim, if necessary, see Vt. Stat. Ann. tit. 21, § 1301(17)(B) and (C); N.J. Rev. St. § 43:21-19(c)(1); Mass. Ann. Laws, 151A § 1; 1995 NY S.B. 7957, Sec. 3 and 28; see Stip. at ¶ C.6., Resp. App. 9; Tr. 27.

Nine states (not eight as the Director contends, see Pet. at 9) use ABPs. See Finding no. 31, App. 50; Stip. ¶ C.6, Resp. App. 9; Pennington I, App. 20. The Director miscalculates because she counts New York as a state still using a wage request system. Pet. at 9-10 n. 4. But New York switched from a wage request system to an ABP in 1996. See 1995 NY S.B. 7957, Sec. 3 and 28.

6. Looking only to the wages Pennington had earned in calendar year 1983, the base period defined by her June 1984 claim, Pennington was ineligible for benefits. Stip. at ¶ B.2.c., Resp. App 5. Accordingly, IDES denied that claim. Id.; P. Ex. 3.

Pennington remained unemployed, however, and filed a second claim for benefits on or about October 5, 1984. Stip. at ¶ B.2.e., Resp. App. 6. The base period determined by reference to that October claim included the period from January 1 through June 30, 1984. Stip. at ¶ B.2.f.; Resp. App. 6. That is, by the passage of time, the quarters that had previously been Pennington's filing and lag quarters when she filed in June, became base period quarters when she filed in October and, consequently, the wages that IDES disregarded for purposes of her June claim, became qualifying wages for purposes of her October claim. Stip. at ¶ B.2.g., Resp. App. 6. She thus became entitled to receive benefits. Id.; see Pet. at 5 (although "Pennington was denied ... [unemployment insurance] benefits upon filing her June 1984 claim because she had earned no wages during her base period[,] ... [i]n October 1984, she [became] ... monetarily eligible for [unemployment insurance] benefits based on her earnings in the first and second quarters ..., and she did receive benefits for the benefit year beginning October 1984 after filing a second ... claim").

To receive benefits, however, Pennington had to wait from June 7 to October 5, 1984, whereas, if IDES had used Pennington's lag quarter wages to determine eligibility, she would only have had to wait from June 7 until July 2, 1984 to file a valid claim. Stip.

at ¶ B.2.a.-g., Resp. App. 5-6; Tr. 70-71. Moreover, the Director has stipulated that "[b]y definition, section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of section 237." Stip. at ¶ B.3.b, Resp. App. 7.

III. The "When Due" Clause

Until enactment of the anti-Pennington provision, the "when due" clause "require[d] that a State [unemployment insurance] law include provision for such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). That standard was derived from California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). The Secretary of Labor has also interpreted the "when due" clause to confirm that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2). That rule is required by this Court's holding in Fusari v. Steinberg, 419 U.S. 379 (1975).

IV. The Course And Disposition Of The Proceedings

On April 11, 1994, in the first of two rulings in this case, a Seventh Circuit panel held, unanimously, that section 237 defined a "method of administration" that was subject to the "when due" clause. Pennington I, App. 16-39. The Director had argued that "section 237 functions as a measurement of each claimant's

attachment to the work force ... [and] that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement." App. at 36. But the court of appeals rejected that argument because the Director "has conceded in more than one place that the gap created by section 237's base period, in which a claimant's lag quarter wages are not reported, 'is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. 36 (citing Stip. ¶ C.3, Resp. App. 8).

The literature concerning the history and purposes of the unemployment insurance program confirms the appellate court's conclusion. See Haber, Wm. & Murray, M., Unemployment Insurance In The American Economy ch. 11 at 175 (1966) (the "lag period between the base period of earnings and the beginning of the benefit year was necessary [in wage reporting states] in order to give a state time to collect and post the quarterly [wage] information"). Accordingly, the appellate panel properly held that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." App. 36.

Having "reverse[d] the decision of the district court that section 237 is an eligibility provision as a matter of law," App. 39, the panel then remanded the case to the district court for "factual findings and a determination of the issue of section 237's

compliance with the 'when due' clause and corresponding regulations." App. 38-39. On remand, the district court found that use of an ABP in Illinois would result in "a dramatic increase in financial benefits to unemployed persons", App. 63 (emphasis in original), in that each year, an ABP would pay an additional $30 to $40 million in benefits, id., to "anywhere from 13,800 to 40,000 members of the plaintiff class", and that "even the lowest estimate of 13,800 additional eligible claimants [per year] represents a significant increase in the number of claimants who would receive benefits under an ABP." App. 62. The district court also found that "an ABP results in prompter payment of benefits to both lag quarter eligible and filing quarter eligible claimants." App. 64.[8]

The district court next considered the costs to IDES in adopting an ABP. In doing so, it considered both the annual costs of operating an ABP, and the one-time costs of converting to an ABP. App. 56-58. As to both types of costs, however, it "used only IDES' cost estimates, which are significantly higher than the plaintiffs' ... [even though] IDES' cost estimates may well be inflated." App. 64. It did so, in part, because "using the highest cost estimates should demonstrate most clearly whether the costs outweigh the benefits to plaintiffs." App. 64. Despite using IDES's higher cost estimates, the district court concluded

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[8] A study undertaken by the California Employment Development Department (the "California study") shows that use of an ABP in California would result in payment of between $36.5 and $92.7 million in additional benefits to between about 30,000 to 50,000 claimants, and in prompter payment of between $121.1 and $233.4 million. Resp. App. 39-44.

that IDES' costs for implementing an ABP "are not so onerous as to outweigh the benefits to plaintiffs." App. 65. The district court "conclude[d] that section 237 violates the 'when due' clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible", id., and entered judgment for the claimants. App. 42.

In Pennington II, the court of appeals observed that the district court's opinion was "thorough and well-reasoned", App. 5, and concluded that the district court had "correctly implemented our mandate [in Pennington I]." App. 14.

ARGUMENT

I. The Anti-Pennington Provision Undermines The Central Purpose Of The "When Due" Clause

In their appeal to Congress, the proponents of the anti-Pennington provision (the "proponents") urged that Pennington I "represents a 180-degree departure from the manner in which both the federal government and states have construed the Social Security Act, since the statute's enactment more than 60 years ago."[9] Doherty Stmt. at 1, Resp. App. 26. To support that assertion, they argued that "[t]he United States Supreme Court has held that the Social Security Act was intended to recognize the importance of each state establishing its own eligibility criteria

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[9] The proponents contend that this "departure" from the historical interpretation of the "when due" clause was wrought by "unelected federal judges" intent on usurping the legislature's authority on "tax and spending policy." Doherty Stmt. at 1, Resp. App. 26; see id. at 2, Resp. App. 27. But they offered not one iota of support for this accusation against even one of the three judges who sat on the Pennington panel, all of whom were appointed by President Reagan.

for unemployment insurance." Id. at 2, Resp. App. 27. But while "criteria for eligibility [are] largely determined by each state, unemployment insurance is partly financed by the federal government, which naturally has attached some strings to its largesse ... [one of which is] section 303(a)(1) ... of the Social Security Act[, the "when due" clause]." Jenkins v. Bowling, 691 F.2d 1125, 1228 (7th Cir. 1982).

Indeed, Pennington I is not only consistent with, but required by two unanimous Supreme Court cases: California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) and Fusari v. Steinberg, 419 U.S. 379 (1975). See Pennington I, App. 32-36. In Java, this Court recognized that unemployment insurance was designed both "to give prompt ... replacement of wages to the unemployed to enable workers to tide themselves over, until they could get back to ... work ... [and to] exert[] an influence upon the stabilization of industry." 402 U.S. 131-32 (citations omitted). Accordingly, the Java Court held that "'when due' was intended to mean at the earliest stage of unemployment that payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Id. at 131; see also, Jenkins, 691 F.2d at 1229 (Posner, J.) ("Both the humane (or redistributive) objectives of unemployment insurance and its macroeconomic objective (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off").

The "when due" clause requires not only prompt payment of benefits but also prompt adjudication of claims. This Court made that clear in Fusari, 419 U.S. 379, when it expressly rejected any reading of the "when due" clause under which "benefits are not 'due' ... until administratively deemed payable." Id. at 388 n. 15. The Court reasoned that "such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." Id.

Thus, the history of "when due" jurisprudence confirms that Pennington I represented a federal court's enforcement of a federal statute, and belies the proponents' argument that Pennington I represents judicial encroachment on state prerogatives. With enactment of the anti-Pennington provision, however, Congress has declared that, from now on, the "when due" clause will assure prompt payment of benefits only if states do not object.

II. Section 237 Is A Method Of Administration, Not An Eligibility Criterion

A. Though the proponents of the anti-Pennington provision hoped Congress would not be constrained by any "intellectual exercise", Gilbert Stmt." at 5, Resp. App. 25, they tried to provide some rationale for proposing to gut the policy of prompt payment of unemployment insurance benefits. Because the "when due" clause governs only the states' "methods of administration" of unemployment insurance programs, "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. §

640.1(a)(2); see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 482-87 (1977). The proponents therefore urged that section 237 is an eligibility criterion, not a method of administration. See Doherty Stmt. at 1-2, Resp. App. 26-27; Gilbert Stmt. at 3-4, Resp. App. 23-24.

As the court of appeals noted, however, the "truism [that the when due clause governs administrative methods, not eligibility criteria] simply begs the question and, consequently contributes nothing to the inquiry before us." App. 27. Prior to enactment of the anti-Pennington provision, the proper inquiry required a determination of whether section 237 is a method of administration or an eligibility criteria. The anti-Pennington provision resolves that inquiry by dictating that base period definitions are not methods of administration. In over twelve years of litigation, however, no one - not the Director, nor the Secretary of Labor, nor any of the judges or lawyers involved in this case - has ever constructed a cogent argument that would suggest that the lag period serves as anything other than a method of administration.

To press their argument that the lag period is an eligibility provision, not a method of administration, the proponents characterized the Pennington claimants as "individuals who would not qualify using the first four of the last five quarters", Gilbert Stmt. at 4, Resp. App. 24, and they contended that Pennington I therefore "broaden[s] eligibility", Doherty Stmt. at 1, Resp. App. 26, to those not previously eligible. But that is simply wrong. An eligibility provision "define[s] the class of

persons eligible for benefits." Hodory, 431 U.S. at 486-87. The lag period, however, does not exclude claimants from eligibility; it just delays the time at which the state will consider a claimant's most recent wages in determining his or her eligibility. To argue the contrary, the proponents ignored the single most important fact about the operation of the lag period: that the Pennington claimants become eligible for benefits by doing nothing more than waiting until sufficient time has passed to file a second claim, since wages that are initially disregarded because they fall in a claimant's lag period, become qualifying wages by the passage of enough time so that they fall within the first four of the last five completed calendar quarters prior to the filing of the later-filed claim. See Pennington I, App. 33-34.

Like the proponents in Congress, the Director argued in the courts that section 237 is an eligibility criterion. But the court of appeals rejected that argument because section 237 does not concern "what earnings IDES will consider" to determining whether benefits are due, as the Director contended, it only "determines when IDES will count those earnings" and, thus, when benefits become due." Pennington I, App. 33 (emphasis in original). Thus, although Illinois' base period delays the time at which the state will count a claimant's most recent wages toward eligibility, it does not prevent a claimant from using those same wages so long as he waits a sufficiently long time before filing a claim. Causing a claimant to wait to receive benefits, however, is just what the when due clause was designed to prevent. Java, 402 U.S. at 131-33.

B. Eligibility criteria in unemployment insurance statutes "measure a claimant's 'continued and current attachment to the labor force.'" Pennington I, App. 33 (quoting Fleiszig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818, 821 (1952)). The proponents therefore urged that section 237 "[t]he Pennington alternate base period would provide for the payment of unemployment benefits ... to individuals with no established connection to the workforce." Miller Stmt., Resp. App. 30; see also Doherty Stmt at 1, Resp. App. 26 (the lag period "ensures that unemployment insurance will be available for workers with a genuine attachment to the labor force, but not necessarily for those with only a marginal connection").

But that argument is not just wrong, it is perverse. Consider the following table, which exhibits the operation of section 237 on three claimants, each earning $5 per hour:

	1st Quart. Wages	2nd Quart. Wages	3rd Quart. Wages	4th Quart. Wages	5th Quart. Wages	6th Quart. Wages	7th Quart. Wages
No. 1*	0	0	$440	$1160	0	0	0
No. 2**	0	0	0	$2600	$2600	0	0
No. 3***	0	0	0	$2600	$3000	0	$3000

* Receives benefits by filing in the sixth quarter.

** Receives benefits only if he waits to file until the seventh quarter.

*** Receives no benefits because he returns to work just before beginning of 7th quarter.

By any measure of one's attachment to the work force (e.g., amount of wages, hours worked, how recently the claimant was employed prior to applying for benefits), Claimant No. 1 has the most tenuous connection of the three claimants. Yet under section 237, he is awarded benefits in the sixth quarter. By the same measures, if Claimant No. 2 applies for benefits in the sixth quarter, he has a stronger and more recent attachment to the labor force than Claimant No. 1 has when he files at the same time, but Claimant No. 2 is denied benefits in the sixth quarter because of the operation of section 237. If Claimant No. 2 waits and applies again in the seventh quarter, however, he will then be granted benefits, even though his attachment to the work force will have weakened compared to when he first filed in the sixth quarter, just after he lost his job. By every measure, including the fact that he returned to work most promptly, Claimant No. 3 has the strongest attachment to the work force. Yet, because of section 237, he is the only one of the three claimants who receives no benefits at all. Thus, in direct contrast to what any eligibility criterion would do, section 237 "causes ... [claimants] with relatively strong attachment to the work force to wait until that attachment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over)." App. 33-34.

C. Not only have the proponents failed to convincingly suggest how the lag period could serve any eligibility purpose, the have repeatedly conceded that the purpose of Illinois' base period

is solely administrative, not substantive. For instance, in the Pennington litigation itself, IDES admitted that the lag period "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. 36. And in their submission to the Subcommittee, the proponents said that whether states can shorten their lag periods is dependent on whether "technology ... permits states to collect and process wage information more quickly." Gilbert Stmt. at 4, Resp. App. 24.

These concessions confirm what the court of appeals found: that the lag period is "an administrative method employed to accommodate the time needs of a wage record [data collection] system. In a world of high-speed information exchange, the lag quarter would not exist; yet an eligibility requirement like the 'voluntary leaving' provision [which disqualifies claimants who leave work without good cause attributable to the employer] would." Pennington I, App. 36-37. Now, however, by virtue of congressional fiat, lag periods will not be "methods of administration" within the meaning of the "when due" clause, even though, in fact, they will still serve no purpose other than "to give a state time to collect and post the quarterly [wage] information." Haber, Wm. & Murray, M., Unemployment Insurance In The American Economy ch. 11 at 175 (1966). Indeed, the anti-Pennington provision will permit states to employ even longer lag periods than the one used now in Illinois.

III. The Secretaries of Labor Have Not Historically Treated The Base Period As An Eligibility Criterion

The proponents also contended that "since the establishment of the unemployment insurance system, the Labor Department ... has considered a base period of the first four of the last five quarters to be consistent with the [Social Security] Act." Doherty Stmt. at 2, Resp. App. 27; see Gilbert Stmt. at 4, Resp. App. 24. In fact, however, in 1962, the Secretary of Labor issued a policy statement urging states to keep their lag periods "as short as possible" because "unemployment insurance is designed to compensate wage loss", Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962, Resp. App. 53, thus confirming not only that lag periods should not unnecessarily delay payment of benefits, but also that the Secretary has historically treated lag periods as administrative methods, which are subject to his regulatory authority, rather than eligibility criteria, as to which he has no such authority. See Pennington I, App. 31.

The proponents relied on draft bills issued by the Secretary of Labor in 1937 and 1950, which include a base period definition like the one used in Illinois. From those draft bills, they contended that "[t]hroughout the history of the unemployment insurance program, determining the period that constitutes the base period for unemployment insurance claims purposes has been one of many eligibility criteria that federal law left to the states." Gilbert Stmt. at 3, Resp. App. 23; see also Doherty Stmt. at 1, Resp. App. 26 (Pennington "represents a 180-degree departure from the manner in which both the federal government and states have

construed the Social Security Act, since that statute's enactment more than 60 years ago").

But this Court has repeatedly refused to treat draft bills even as interpretative rules to which courts should give some deference. Hodory, 431 U.S. at 484-85; compare R. 98 Ex. A (the 1937 draft bill) at 25 with Java, 402 U.S. at 123 n. 1 (invalidating a provision that appears in the 1937 draft bill as violative of the "when due" clause). Moreover, as the court of appeals noted, the "draft bills do not ... directly address the issue here: whether the lag period arrangement can be termed a matter of eligibility as opposed to a matter of administration." Pennington I, App. 30 (footnote omitted). The court therefore concluded that:

> the mere fact that the draft bills take notice of a lag period similar to the ... [Illinois base period] does not indicate that the lag period is in compliance with the 'when due' clause or the corresponding regulations. A state must pay unemployment benefits 'with the greatest promptness that is administratively feasible.' 29 C.F.R. §640.3(a). Needless to say, what was 'administratively feasible' when the draft bills were written - 1937, 1950, and 1962 - is much different from what is administratively feasible in today's technologically advanced world.

Id. at 30-31, n. 6.

Though it is not true that the Department of Labor has historically endorsed section 237-type base periods, it is true that the Secretary filed an amicus brief in the court of appeals supporting the Director. In response to the Secretary's brief, however, the court of appeals confirmed that it was "mindful of the obligation to defer to the interpretation of an agency whenever that interpretation can be said to embody a deliberate and

considered interpretation of the legislative intent." App. 29. And it therefore "examined wi h great care the sources that, in the agency's view, evidence its longstanding view that issues of lag periods are matters of eligibility and therefore are not subject to the 'when due' clause." Id. Nonetheless, that court rejected the Secretary's interpretation because it did not "reflect the deliberate attempt of the agency to implement the will of Congress through the regulatory process." App. 28.

The court of appeals also noted that the Secretary's position was "developed in the heat of litigation." App. 28. In an amicus brief filed in support of the Director's petition, the Attorney General of California relies on Auer v. Robbins, __ U.S. __, 117 S.Ct. 905 (1997), because in that case, this Court deferred to a position taken by the Secretary in litigation. Id. at 912; see Brief of Amicus Curiae States at 10. But in Auer, the Court noted that "[t]here is simply no reason to suspect that the [Secretary's] interpretation does not reflect the agency's fair and considered judgment on the matter in question." Id. In contrast, after its careful examination of the Secretary's various promulgations, the court of appeals concluded that these materials "cast a great deal of doubt on the proposition that the agency ... consistently has treated ... [lag periods] as a matter of eligibility." App. 31. Thus, in contrast to Auer, there was ample reason for the court of appeals to conclude that the Secretary's interpretation did not reflect the agency's fair and considered judgment.

IV. The Anti-Pennington Provision Will Exacerbate A Deep Decline In The Rate Of Unemployment Insurance Recipiency At An Enormous Cost To The Nation's Poorest Workers

In Illinois alone, the enactment of the anti-Pennington provision will prevent a "dramatic" increase of $30 to $40 million in unemployment insurance benefits to "anywhere from 13,800 to 40,000 unemployed persons." App. 63. Moreover, as confirmed by the California study, because many other states use section 237-type base periods, the potential nationwide effect of the legislation is all the more striking.

The importance of those numbers can only be appreciated if they are considered along with the data that confirms the steep decline in unemployment insurance recipiency rates. In 1988, the Congressional Research Service ("CRS") reported that "the share of the unemployed receiving benefits declined to its lowest level in program history, below one-third. In 1987, only 32 percent of the unemployed received [unemployment insurance benefits]." Federal-State Unemployment Compensation System, (submitted to the House Ways and Means Subcommittee on Public Assistance and Unemployment Compensation) (Sept. 8, 1988), § 1.10 at 9. In 1993, in report to the Chairman of the Senate Committee on Finance, the General Accounting Office ("GAO") confirmed that, in contrast to "the 1973-75 recession, [when] up to 50 percent of the unemployed were receiving [unemployment insurance] benefits[,] ... about 39 percent [received benefits] during the recession that begin in 1990 - one fifth less." Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at p. 12.

The 102nd Congress empaneled the Advisory Council on Unemployment Compensation ("Advisory Council") to study the nation's unemployment insurance program. See P.L. 102-164.[10] In its 1996 report to Congress, the Advisory Council confirmed that, in 1995, 14 states paid unemployment insurance to a quarter or fewer of their unemployed workers, and that Illinois paid only 37.2% of its unemployed. Defining Federal And State Roles in Unemployment Insurance, A Report to the President and Congress, Advisory Council on Unemployment Compensation (Jan. 1996); see Table 4-2 "Ratio Of Unemployment Insurance Claimants To Total Unemployment, By State, 1995." And in her testimony before the House Ways and Means Committee's Subcommittee on Human Resources (the "Subcommittee"), Commissioner Norwood said that the most recent data shows that "only 37.4 percent of the unemployed ... are receiving [unemployment insurance] benefits." Norwood Stmt. at 2, Resp. App. 34.

Furthermore, the GAO's study confirms that the decline in recipiency rates for unemployment insurance is largely due to competition among states to limit the costs of their program. Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at p. 22. And Commissioner Norwood warned that the Advisory Council's "research showed that the pressures under which many of the states were operating encouraged a 'race to the bottom,' which affected ... low

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[10] The Council was chaired by Dr. Janet L. Norwood, the former Commissioner of the Bureau of Labor Statistics.

wage workers[, and] ... that the competitive pressures among the states to attract business could well lead to a continued decline in the percentage of unemployed workers who receive benefits." Norwood Stmt. at 4-5, Resp. App. 36-37.

A recent study concludes that "[t]he presence of an alternative [movable] base period raises the number of monetarily eligible claimants by 6 to 8 percent." Vroman, Wayne, The Alternative Base Period in Unemployment Insurance: Final Report (Jan. 31, 1995). Thus, enforcement of a federal standard of prompt payment of unemployment insurance benefits to prevent states' from using long lag periods is critically important to any effort to halt the decline in recipiency.

Also, "[t]he receipt of [unemployment insurance] benefits [is] an important factor in keeping unemployed workers above the poverty level." Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107 (Sept. 1993) at 5. By definition, the claimants in the Pennington class are the poorest eligible unemployment insurance claimants. In her testimony, Commissioner Norwood said that the unemployment insurance system in some states "discriminates against the working poor, exactly the group we most need to help in our society", Norwood Stmt. at 5, Resp. App. 37, and that the problem of insuring the working poor against unemployment will grow more acute "as an increasing number of people move from welfare to jobs as the result of the recent welfare legislation." Id.

Given this background, it is not surprising that, in its February 1995 report to the President and Congress, the Advisory Council recommended that "[a]ll states should use a movable base period in cases in which its use would qualify an Unemployment Insurance claimant to meet the state's monetary eligibility requirements." Unemployment Insurance in the United States: Benefits, Financing, Coverage, Advisory Council on Unemployment Compensation, Feb. 1995 at 17. Thus, by enacting the anti-Pennington provision, Congress and the President not only rejected a policy designed to protect the incomes of America's poorest workers, but they did so contrary to the advice offered by the very body they had established to provide precisely such guidance.

V. The Use Of An Alternative Movable Base Period Would Neither Substantially Increase The Costs Of Operating The Unemployment Insurance Program Nor Unduly Burden Employers

As discussed above, the anti-Pennington provision cannot be justified as consistent with the history or purposes that underlie the nation's unemployment insurance program. Accordingly, though the constitutional tests for legislation are extremely forgiving (see pp. 3-4, supra), if the proponents had offered no other rationale for its enactment, the anti-Pennington provision would be subject to attack as not "justified by a rational legislative purpose." Gray, 467 U.S. at 730. But the proponents also contend that alternatives to section 237 are too costly both to the states and to employers. In fact, enactment of the anti-Pennington provision saves states and employers very little, and it does so not only by imposing far larger costs on the poorest unemployed

workers, but also by ignoring the common interest in "dampening the business cycle by keeping up the purchasing power of people laid off in a recession." Jenkins, 691 F.2d at 1229; see Java, 402 U.S. 131-32 (the "when due" clause is designed, in part, to stabilize industry).

Those arguments, however, question whether the anti-Pennington provision is wise, not whether it is rational. And "judgments about the wisdom of ... [the anti-Pennington provision] remain within the exclusive province of the legislative and executive branches." Gray, 467 U.S. at 729. That being said, however, we believe it important to demonstrate just how unwise enactment of the anti-Pennington provision was.

A. The Costs To States Of Movable Base Periods Are Minimal

The proponents contend that section 237 "streamlines administration and minimizes the risk of fraud" because it allows for verification of a claimant's wages with data that "should already be in the state's computer system when the initial claim is filed." Doherty Stmt. at 1, Resp. App. 26. But the testimony in Pennington confirms that a movable base period can be most easily designed by using the very same wage data - collected and processed in precisely the same way - that Illinois does now. Tr. 32-33, 35, 36-37, 89. The only difference would be that, for claimants who need their more recent wages to qualify, instead of enforcing a mandatory delay on use of such wage data, the state would assess eligibility as soon as the more recent wages were entered onto the state's data base. Tr. 57-8. Since exactly the same wage data

would be collected in exactly the same way, a movable base period would neither affect the efficiency of the existing data collection system, nor increase opportunities to commit fraud by submission of improper wage statements, nor impose new paperwork burdens on employers or the state. See Pennington II, App. 5, n. 3 (noting that the district court did not consider the risk of increased fraud to be a consideration because "IDES did not argue ... that adopting an ABP would necessarily lead to an increase in the number of fraudulent claims").

The proponents also argue, however, that the Pennington decision "could have a costly impact upon ... state government[s] ... and aggravate the federal deficit by hundred's of million's of dollars." Doherty Stmt. at 1, Resp. App. 26. They estimate that the administrative costs in Illinois would be "million's of dollars in one-time costs and $2.5 million in yearly operating expenses." Id. at 2, Resp. App. 27; see Gilbert Stmt. at 3, Resp. App. 23 (quantifying the one-time costs at $13 million). They estimate trust fund outlays for additional benefits of 1.5%; but note one study that, they claim, indicates that alternate base periods could "raise state Trust Fund outlays by four to six percent." Doherty Stmt. at 3, Resp. App. 28; Miller Stmt. at 1, Resp. App. 30. From these estimates, they contend that trust fund outlays for a movable base period would be between $100 to $400 million over 8 years which, they assert, would trigger tax increases or rising deficits. Id. From all these figures, the proponents conclude that Pennington I will "cause nationwide disruption in the various

states' unemployment compensation system." Doherty Stmt. at 4, Resp. App. 29.

Even using Illinois' inflated cost estimates, however, the district court concluded that IDES' costs for implementing an ABP "are not so onerous as to outweigh the benefits to plaintiffs." App. 65. Moreover, Illinois' estimates are grossly inflated.

First, as accurately described by the court of appeals, the claimants' evidence supports a narrowly-based challenge to the section 237-type base period; not a challenge based on any alternative base period that any litigant might conceive. App. 22-23, n. 3. Furthermore, as the proponents concede, nine states already use movable base periods. Yet the sky has not fallen in any of them. Indeed, the Advisory Council concluded "that advances in technology have made it feasible for all states to use the most recently completed quarter when determining benefit eligibility." Unemployment Insurance in the United States: Benefits, Financing, Coverage, Advisory Council on Unemployment Compensation (Feb. 1995) at 16. Also, the provision that the Supreme Court struck down in Java was used in 48 states. See Appendix to Appellants' Brief in Java, No. 507 (U.S. Sup. Ct. 1970) at 69-70. Yet the proponents offer no evidence that compliance with Java disrupted the nation's unemployment insurance program at all.

Furthermore, the Department of Labor has received, but not yet published, a report on administrative costs of an alternative base period. From speaking to the authors of that report, we have confirmed that Illinois' cost estimates are wildly inflated.

Illinois' estimates of the administrative costs of a movable base period include unnecessary additional costs for two components: one was a "reachback" system[11], but the most costly was a wage request system to obtain wage data before it is reported in the normal manner. The evidence at trial confirmed that if Illinois did add a wage request component to a movable base period, that alternative would be "administratively feasible" in the sense that, if there was no cheaper alternative, the costs of those systems would be worth the benefits they would generate to the claimants. Tr. 78-79; 88-89; 700-701. But, in Illinois, the marginal benefits of adding a wage request component are too small to justify its greater expense over the alternative of simply using

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[11] The district court found that "[i]f IDES implements an ABP, it intends to include a 'reachback' system in order to identify an undetermined number of members of the plaintiff class and pay them benefits they were denied under the present system, even though neither ... [of the alternatives for ABPs that plaintiffs suggested] require it." Finding no. 40 at App. 53 (citations omitted). Though the Eleventh Amendment to the U.S. Constitution bars federal courts from ordering IDES to reachback prior to the date of the court's "determination of ... wrongfulness", Fitzpatrick v. Bitzer, 427 U.S. 445, 451 (1976); see Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991), the Director argued that a reachback system was necessary because an ABP might "not be up-and-running... [when] the requisite statutory change is passed." R. 209 at 28-29. But no "statutory change" is necessary to effect relief either. See Pennington I, App. 25-26.

Nonetheless, the district judge credited the Director's argument by construing it as the "belie[f that] a reachback system is necessary because ... [IDES] cannot be certain that any new system would be in place in a timely manner, and thus it would have to pay retroactive benefits for the period from the date the new system should have been operational to the date the new system is actually operational." Finding no. 40 at App. 54 (citations omitted). But New Jersey instituted a movable base period using the most recent completed calendar quarter immediately upon enactment of the statutory change requiring it to do so. See NJ Legis. 234 (1995).

the most recent wage data when it is reported in the usual course. Id. Thus, while Illinois could enhance a movable base period system marginally by incorporating a wage request component, the "when due" clause does not require that it do so. If the unnecessary costs of wage request and "reachback" systems are eliminated from Illinois' estimates, the one-time costs of adopting a movable base period drop $7.1 million, from $13.3 million to $6.2 million, and the yearly operating costs drop $2.4 million, from $2.8 to a meager $400,000. See P.Ex. 23 at 29, P.Ex. 24 at 2, 13, P.Ex. 25 at 24, P. Ex. 26 at 4.

As for trust fund outlays, the evidence at trial confirmed that a movable base period in effect in Illinois during 1986 would have paid a substantial proportion of about 23,000 additional claimants approximately 13.6 million additional dollars, and approximately 13,000 claimants would have been paid benefits sooner. In 1994, the Director estimated that the additional benefits paid to claimants would be about $30 to $40 million a year. See P. Ex. 22. The Director's "high side" estimate of the trust fund costs is now $100 million annually. Doherty Stmt. at 3, Resp. App. 28. But that figures assumes that, because the percentage of claimants who receive benefits would increase by as much as 6% if the state used an alternative base period, the trust fund outlays would also increase that much. Id. That assumption is unquestionably wrong, however, since the vast majority of claimants who would benefit from a movable base period are those who would receive at or near the minimum benefit amount.

Moreover, the assurance in the pre-amendment "when due" clause that states would honor the claimants' interest in prompt payment of benefits necessarily meant greater outlays from the trust fund. But since "the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible ... is what the Unemployment Insurance program was all about", Java 402 U.S. at 135, to complain that states were obligated to pay benefits promptly is to complain of the very purpose of the unemployment insurance system itself. And, conversely, to amend the "when due" clause to protect states from paying benefits promptly is to gut the central public policy that underlies the nation's unemployment insurance program.

Indeed, in her testimony before the Subcommittee on behalf of Illinois' Governor, Jim Edgar, the Director conceded that Illinois was not acting primarily in its own interest by urging enactment of the anti-Pennington provision, but that instead, it was promoting the interests of Illinois' employers. Doherty Stmt. at 1, Resp. App. 26 ("Unemployment insurance is funded almost exclusively by employers. In Illinois, it is funded 100 percent by employers"). Yet, as confirmed below, the costs to employers are not only minimal, but entirely fair.

B. The Costs To Employers Of Movable Base Periods Are Also Minimal

Using the estimate that recipiency would increase by as much as 6% under an alternate base period, Mr. Miller, the one employer-proponent, assumed that taxes on employers would increase by that same rate, requiring payment of as much as $40 million in

additional taxes each year. Miller Stmt. at 1, Resp. App. 30. As noted, however, since the vast majority of claimants who would be benefitted by a movable base period are those who would receive at or near the minimum benefit amount, the percentage rise in recipiency is larger than the percentage rise in trust fund outlays. And since taxes are related to trust fund expenses, not recipiency, they would not rise by 6% either.

Mr. Miller also urged that his company provides long-term, stable employment. Id. If that is so, however, his workforce does not include Pennington class members since they are, by definition, those who have only recent earnings available to qualify for benefits. Moreover, since the tax system in Illinois, like most states, is experience rated, employers who do not have a substantial unemployment insurance claims experience, pay less taxes than employers (such as seasonal businesses) that provide shorter, less stable employment. Thus, if we take Mr. Miller at his word, he has little, if any concern that his company will be burdened by whatever tax increase arises as a result of the Pennington decision.

Moreover, for many years, the employers who do employ Pennington class members have not had to finance unemployment insurance to pay benefits to the Pennington claimants. Those employers have been permitted to escape that part of the excise tax they were supposed to pay for use of the nation's labor supply. Indeed, a study by the U.S. Department of Labor, using data from Illinois, concludes that certain unscrupulous employers obtain a

form of subsidy by laying off workers while their wages are still within the lag period, thereby avoiding the charge that would otherwise be associated with those workers' unemployment insurance claims. Unemployment Insurance and Employer Layoffs, Occasional Paper 93-1, U.S. Dept. of Labor (1993). The researchers estimated that "27 percent of all (UI chargeable) layoffs for a 4-5 quarter period were free layoffs to the firms initiating the layoffs ... [and that] the percentage of layoffs that are free varies from only 13 percent for the largest firms to 39 percent for construction firms." Id. at xiv. They concluded that "this [unemployment insurance] subsidy actually tends to destabilize rather than stabilize employment." Id. at 3. The GAO drew the same conclusion in its 1993 report to the Chairman of the Senate Committee on Finance. Unemployment Insurance: Program's Ability to Meet Objectives Jeopardized, GAO/HRD-93-107, at 5 (Sept. 1993) (Illinois "officials ... said some employers control employee work schedules and earnings to ensure that they do not meet the qualifying requirements").

Thus, by enacting the anti-Pennington provision, Congress has decided to undermine a 60-year old policy of paying unemployment insurance benefits as promptly as possible because some employers who hire the nation's most vulnerable workers prefer not to pay their fair share of the costs of unemployment when they lay those workers off. Moreover, to effectuate that purpose, Congress lied by saying that base period definitions are not methods of administration when, in fact, they could be nothing else.

CONCLUSION

Congressional enactments must be obeyed as if they were wise and true even if they are neither. Accordingly, the anti-Pennington provision compels the Court to grant the Director's supplemental petition for certiorari.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

III. STIPULATIONS OF FACT

A. The Application of Section 242

1. To be eligible for benefits under the IUIA, a claimant must have been paid, during his "base period," wages for "insured work" (as that term is defined in Section 236 of the IUIA, Ill.Rev.Stat. ch. 48, §346) of not less than $1,600 of which at least $440 must have been paid during that part of his "base period" which does not include the calendar quarter in which the wages paid to him were highest. Ill.Rev.Stat. ch. 48, §420(E). (Hereafter the term "sufficient wages" is used to indicate that a claimant has earned both $1,600 of total base period wages and $440 outside the calendar quarter in which wages were the highest.)[3] Those claimants who have sufficient wages in their base period are said to be "monetarily eligible."

2. The question of whether a claimant is monetarily eligible is resolved by a "finding" as required by Section 701 of the IUIA. Ill.Rev.Stat. ch. 48, §451. If a claimant is found monetarily eligible, (s)he is said to have filed a "valid claim" within the meaning of Section 242 of the IUIA. Ill.Rev.Stat. ch.

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[3] For example, for a claimant filing in the first quarter of 1989, the base period would be the fourth quarter of 1987, and the first three quarters of 1988. If the claimant had earned $1160 in one of those base period quarters, $400 in another of the base period quarters, and $20 in each of the other two base period quarters, he would have earned just enough to qualify.

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48, §352.[4] Under the IUIA, a "valid claim" for benefits cannot be filed without sufficient "base period" wages.

3. A "benefit year," for initial claims, is the one year period beginning with the first day of the week (i.e. the Sunday of the week) with respect to which the individual first files a valid claim for benefits. Ill.Rev.Stat. ch. 48, §352.

4. Section 237 of the IUIA defines "base period" as the first four of the last five completed calendar quarters immediately preceding the claimant's benefit year. Ill.Rev.Stat. ch. 48, §347.

5. In determining whether a claimant has sufficient base period wages, Section 237 as enacted, does not allow IDES to use wages earned by a claimant in either the calendar quarter in which his claim is filed (the "filing quarter") or the immediately preceding calendar quarter (the "fifth completed quarter") when it determines whether the claimant has sufficient base period wages.[5]

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[4] That a claimant files a valid claim does not necessarily mean (s)he will receive benefits, because (s)he can be disqualified based on a non-monetary "determination" issued pursuant to Section 702 of the IUIA. Ill.Rev.Stat. ch. 48, §452. Examples of possible non-monetary reasons for disqualification are "misconduct" or "voluntary leave" disqualifications. See Ill.Rev.Stat. ch. 48, §§431 and 432.

[5] For example, assume that a claimant earned $1500 in the second base period quarter, $400 in the third, $20 in the fourth but none in the first. Assume, too, that (s)he earned $20 in the fifth completed quarter. Since the wages in the fifth completed quarter are disregarded, the claimant is ineligible as to this claim because, though (s)he earned more than $1600 in the base period defined by Section 237, (s)he did not earn at least $440 outside the calendar quarter in which the wages were highest.

6. Those claimants who need to have wages in the filing quarter, the fifth completed quarter, or both quarters counted by IDES to establish that they have earned sufficient wages are determined ineligible for benefits as of the date of their initial benefit claim because of the operation of Section 237.

7. Those claimants who do not have sufficient wages pursuant to Section 237 in the base period may be required to wait up to six months until those wages fall into the first four of the last five calendar quarters, defined by a later claim, in order to file a "valid claim" for benefits.

8. For claimants who are not monetarily eligible when they first attempt to file a "valid claim" because some or all of their wages are not in their base period, IDES will accept later filed claims as "valid claims," assuming that there are sufficient wages for the base period defined by the later claims.[6] IDES prospectively treats such claimants as eligible to receive benefits for weeks after the filing of the second or "valid claim," but not for weeks between the filing of the first claim and the filing of the second or "valid claim."

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[6] For example, the person described in fn. 5 will be eligible if (s)he files in the next quarter. The new base period will not include the quarter that had been the first base period quarter with reference to the first claim (in which (s)he earned nothing). Instead, it will consist of the second, third and fourth quarters and the fifth completed quarter created by the first claim. Those quarters contain $1500, $400, $20 and $20, respectively. Thus, by reference to the second claim, the claimant has both total wages of more than $1600 and $440 outside the quarter in which the wages were highest.

9. A change in the base period to one of the two systems that plaintiff claims are administratively feasible ("alternative systems") will (a) speed payment of benefits to those claimants whose benefits are delayed under the present system; (b) result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the existing system. This latter group includes those who could file a second or "valid claim," but do not do so, or those who become employed again before they can file a second or "valid claim" or before they receive as many weeks of benefits as they would have received under the alternative systems.

B. The Parties, The Class, And The Application Of Section 237 To The Named Plaintiff And The Class.

1. The Defendant

a. Sally Jackson f/k/a Ward, is the Director of IDES. As such, she has the responsibility for the administration of all unemployment insurance and employment service programs in Illinois. Ill.Rev.Stat. ch. 48, §610.

b. Jackson is sued in her official capacity.

c. IDES is Illinois' state employment security agency ("SESA"). Each state that participates in the federal unemployment insurance program (and all states do so) has an SESA.

d. IDES operates through a central office located at 401 S. State Street, Chicago, Illinois where management functions, and part of the appeals section are located, and through local unemployment insurance ("UI") offices which are located throughout the state. The local UI offices are where individuals file claims for unemployment insurance and where those claims are processed and initially adjudicated.

e. An organization chart of IDES is attached as Plaintiffs' Exhibit ("P. Ex.") 1.

2. The Named Plaintiff

a. Plaintiff, Luella Pennington, is a citizen of the United States who resides at 6321 N. Winthrop, No. 103, Chicago, Illinois 60660.

b. Pennington filed an initial claim for unemployment benefits on June 7, 1984. Under Section 237, the base period created by that claim consisted of the four calendar quarters in calendar year 1983 since they were the first four of the five completed calendar quarters preceding the quarter in which Pennington filed.

c. Pennington received no wages for insured work in calendar year 1983. Therefore, under existing Illinois law, she was not monetarily eligible for benefits based on her June 7, 1984 claim.

d. Pennington did receive wages for insured work in the first and second quarters of 1984.

e. Pennington filed a second claim for unemployment benefits on October 5, 1984.

f. Under Section 237, Pennington's base period for her October 5, 1984 claim included the third and fourth quarters of 1983 and the first and second quarters of 1984.

g. Pennington had sufficient wages in the base period defined by reference to her October 5, 1984 claim to make her monetarily eligible for benefits. She was paid benefits beginning the week of October 5, 1984.

3. The Class

a. By order of July 11, 1986 this Court conditionally certified a class defined as follows:

> All claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("the Act"), who since July 15, 1983, have been, are being or will be denied such benefits by the Illinois Department of Employment Security solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of Section 237 of the Act.[7]

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[7] By order of March 19, 1986, this Court permitted plaintiffs to amend their complaint, which was originally filed July 15, 1985, to encompass class members back to July 15, 1980. That decision, which the Court described as "a very close call," was based on the holdings in Shortess v. City of Chicago, 617 F.Supp. 661, 662-66 (N.D. Ill. 1985) and Johnson v. Arnas, 624 F.Supp. 1067, 1068-1073 (N.D. Ill. 1985), that the limitations period for §1983 actions in Illinois was 5 years. Those

b. By definition, Section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of the operation of Section 237.

c. In 1986, 526,469 claims for unemployment insurance benefits were filed with IDES. Of these, 63,518 claims were denied because they lacked qualifying wages. Of those 63,518 claims, approximately 15,034 would have been monetarily eligible if the wages they earned in the fifth completed quarter had been counted as qualifying wages, and another 9,115 individuals would have been eligible if the wages they earned in the filing quarter had been counted as qualifying wages.

C. Reporting Wage Record And Wage Request Systems

1. Generally speaking, there are two systems that states use for compiling wage data to determine whether unemployment insurance claimants have sufficient wages to qualify for benefits: the wage record reporting system, and the wage request reporting system.

2. The most common system used today is a wage record system. That is the system used by Illinois. Under a wage

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decisions have since been rejected in Kalimara v. Illinois Department of Corrections, 879 F.2d 276, 227 (7th Cir. 1989). Plaintiffs, therefore, agree that the class herein should be redefined to extend back only two years prior to the filing of the complaint or until July 15, 1983.

record system, those employers who are covered by the state's unemployment insurance statute report gross wages of all their employees to the state's SESA on a regular (usually quarterly) basis.

3. A wage record system is characterized by the existence of a gap between the end of a claimant's base period (in Illinois, the last day of the fourth of the five completed calendar quarters prior to the quarter in which the claimant filed for benefits) and the beginning of that claimant's benefit year (in Illinois, the Sunday of the week in which the claimant filed for benefits). This gap is necessary because some time is required for employers to report wages and for the SESA to make that information available in the local UI offices where claims are first taken and adjudicated.

4. In contrast, under a wage request system, wage information for a particular claimant is requested of that claimant's employer(s) when the claimant files a claim.

5. Since, in a wage request state, wage information is not reported to a SESA except as required to adjudicate each particular claim, SESAs can request the most recent wage information for each claimant. That is, there is no need for a gap (or at least not a substantial one) between the end of the claimant's base period and the beginning of that claimant's benefit year. When the SESA requests wage information, it requests it for the year's period just before the claimant filed the claim. Consequently, wage request systems are characterized

by base periods that have either no gap (e.g., the 52 consecutive calendar week ending with the day immediately preceding the first day of the week in which the claimant files a claim, Mass. Ann. Law ch. 151A, §1(a)), or no substantial gap (e.g., the first 52 of the last 54 weeks preceding the week in which the claimant first files a claim. See, R.I. Gen. Laws §28-42-3(10) for benefit years beginning prior to October 1, 1989.

6. A few states "move" the base period upon the filing of a claim by a claimant who needs his more recent wages to qualify. That is, the SESA first looks at the wages earned in the first four of the last five completed calendar quarters, but if the claimant lacks sufficient wages to qualify for benefits, the SESA then redetermines the claim based on the wages earned in the four completed calendar quarters prior to the date of the claim. E.g., Ohio Rev. Code Ann. §4141.01(Q)(1), (2). In one case, Vermont, the base period can be moved to include the wages earned in the last three completed calendar quarters and in the weeks of the filing quarter prior to the date of the claim. 21 V.S.A. §1301(17).

7. A chart of the systems used by all of the states is P. Ex. 2. Approximately 80% of all other jurisdictions have a wage record system similar to that in Illinois.

8. To the best of the parties' knowledge, the Secretary of the United States Department of Labor has certified every state's base period as meeting the requirements of the

Social Security Act and the regulations of the United States Department of Labor.

D. Illinois' Wage Record System

1. Illinois is a wage record state. When a person first files a claim for unemployment benefits, IDES's staff in the local UI office accesses the Benefit Information System ("BIS") which is a computer based processing system which stores information regarding the payment of unemployment insurance benefits to claimants, processes payments of benefits to claimants and reports on benefit payment activity. BIS is part of the Program and Planning Division of the Management Information System Division of IDES. (Interrog. No. 17, 2nd set; Carrig 15-11.)

2. When a claim is entered on the BIS, the computer generates a document showing the claimant's base period, the wages in each quarter of the base period, and the resultant benefit amount. That document reflects the "finding" required by Section 701 of the IUIA. See Section III.A.2 supra. The form on which IDES makes the finding is attached as P. Ex. 3.

3. Illinois employers file, with IDES, quarterly reports of the gross wages paid to their employees. See, Ill.Rev.Stat. ch. 48, §§550-553, 56 Ill.Adm.Code 2760 subpart B. This data is used to make both a finding of a claimant's base period wages, that is, whether a claimant files a "valid claim"

for benefits, and the computation of the contributions due from the employer to the Illinois unemployment trust fund.

4. Employer's wage reports to IDES are submitted to the Document Control Subdivision of the Revenue Division of IDES.

5. Employers can report wage information either on a form called a UC 3/40 (a copy of which is P. Ex. 4) or on magnetic tape. The UC 3/40 contains two parts. The first is the UC-40 which is the part that records employees' wages.[8]

6. Employers are required to report by the last day of the month following the quarter in which the wages were paid (i.e., April 30, July 31, October 31, and January 31). See 56 Ill.Adm.Code §2760.125. Hereafter, these months are called "reporting months."

7. When IDES receives wage information from employers on a UC 3/40, the UC 3/40 goes to the Springfiled Processing Center at Marine Bank. There the report is opened, sorted by type, given a "batch" number so that it can be identified later if necessary, microfilmed, boxed, the employer's check for contributions paid, if any, is removed and deposited, and the wage information is keypunched and sent on tapes to the State of Illinois Data Center in Springfield. It takes 1 to 5 weeks until the information is input into IDES's computers on its Accum File. IDES receives wage data on tape from Marine Bank which, in that form, can be used by the Illinois Central Computer Facility which

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[8] The second part, the UC 3, is to account for the amount of contributions the employer owes.

has the following four computers: one IBM 3090/600S - 256 MEG-80 Channels; one IBM 3090/600E - 256MEG - 80 channels; one IBM 4381 - 32MEG - 12 channels; and one AMDAHL 5880 - 96MEG - 48 channels. The operating systems and release versions used by each of these computers is MVS/XA release 2.2 with JES2, and the language used is cobal. The programming was designed by Arthur Anderson and Company.

8. About 88% of the employers file their UC 3/40's in a timely fashion.

9. The Error Correction and Validation Unit corrects UC 3/40's that were improperly filled out. That unit handles less than 1% of the UC 3/40's that are filed.

10. There are four peak periods in which the work IDES does processing the wage information reported by employers is greatest. In the Document Control Subdivision, these peak periods begin about one week prior to the end of the reporting months, and last about 3 to 8 weeks with an additional week to process delinquent reports.

11. IDES receives about 80% of the employers' wage reports in a ten-day period between the last five days prior to the end of a reporting month and the five days after the end of a reporting month.

12. Approximately 3% of the employers in the state report their wages directly on magnetic tape, but that constitutes about 20-22% of the wage information reported because

the employers who do report on magnetic tape tend to be the larger employers.

13. Magnetic tapes are sent to employer representatives in the Magnetic Tape Unit of the Employer Contact Section of the Document Control Subdivision of the Revenue Division of IDES.

14. IDES encourages employers to report wage information on magnetic tape because it is a more efficient means of processing wage reports than by use of the UC 3/40. The magnetic tape substitutes for the wage information that would otherwise be reported on the UC 40. The magnetic tape information of employees' wages is logged and sent by the Magnetic Tape Section to MISD.

15. After a magnetic tape arrives at MISD, it takes 12 to 36 hours until the information contained on it is posted on the computers except that it can be up to 72 hours during peak periods.

16. Less than .001% of the reports sent by magnetic tape have errors.

17. IDES is considering accepting computerized wage data on "floppy disks," but has not instituted that alternative yet because IDES does not have the computer software to do so and may have to have some new hardware, too.

18. Data entered into the computer system is accumulated in an "Accum File" where it is checked by the computer system against certain criteria (e.g., receipt of all

information), and where the Error Correction and Validation Unit corrects mistakes.

19. Prior to July, 1989, IDES stored data on its computers as follows: After the six to eight week cycle that occurs after each quarter when IDES receives and processes wage reports, the information held on the "Accum File" was unloaded onto the Wage Record Data Base. The Wage Record Data Base for a new quarter was then processed to the BIS prior to every quarter so that when a new quarter began, the four quarters included in the base period defined by a claim filed in the new quarter were processed when a finding was requested from the computer in a local UI office. That is, data for a new quarter was added and data for the oldest quarter was dropped from the base period just prior to the end of each quarter. The data was changed over a weekend.

20. As of July, 1989, because of a statutory change to the Illinois Unemployment Insurance Act, IDES began entering wage information for the last completed quarter into its Accum file about once a week and more frequently towards the end of a quarter.[9] Local office employees can see these wages as soon as they are posted to the Accum file. The information is used to determine a claimant's last employing unit. This wage

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[9] Generally, the statutory change made only the last employer (for whom the claimant worked at least 30 days) prior to the filing of the claim liable for benefit charges, whereas generally, the statutory provision prior to the change apportioned the charges to all base period employers. See, P.A. 85-956 and P.A. 86-3 (amending Ill. Rev. Stat. ch. 48, ¶ 572.1).

information does not interface with other computerized information. Section 237 of the IUIA does not permit the use of such wages as base period wages.

E. IDES Computer Data

1. IDES produced two sets of computer data to plaintiffs. One was information on all 1986 claimants. The other was a sample of 200 claimants from 1985.

2. IDES extracted all claims from 1986 from its BIS database identified by social security number. IDES also provided the wages in each claimant's base period from the BIS. IDES then went to the wage record database and produced each claimant's wages for his/her fifth quarter and filing quarter. From this information, it can be determined who was monetarily ineligible when they first filed and who, among the group of monetarily ineligible claimants, would become qualified by use of the lag quarter wages and/or the filing quarter wages. IDES also identified which claimants who were monetarily ineligible when they first filed actually filed later claims and when they did so. A copy of a document entitled "Final Pennington Statistics," which is data from the 1986 study, is P. Ex. 5. Finally, IDES provided a breakdown by week of how quickly, during a quarter, wage data is reported by employers and input by IDES into its Accum File and checked for errors.

3. Pursuant to a discovery request from plaintiff, and pursuant to a methodology suggested by plaintiff's expert, IDES also provided a sample of 200 claimants from 1985 who were

monetarily ineligible. For each such claimant, IDES provided the date of claim, the wages in each of the four quarters of the base period, and the wages in the filing and lag quarters. A copy of a document entitled "First 200 Ineligible Claims With Effective Dates in 1985 Sorted by Date of Claim, Then Social Security Number" is attached as P. Ex. 6. This document was produced pursuant to this Court's order of December 3, 1986.

F. IDES' Cost Model Accounting

1. Introduction

a. The question of whether it is administratively feasible to change the definition of the base period is largely a question of the costs of the existing system as compared to the costs of any alternative. IDES and other SESA's measure the costs of various parts of their operation by a process developed at the Employment and Training Administration ("ETA") of the United States Department of Labor ("USDOL") and used by SESAs throughout the United States. The process is called cost model management system. The process is described in the Cost Model Management System Handbook ("Handbook"), which is published by the ETA. A copy of the Handbook is P. Ex. 7. The last time the USDOL funded a cost model management study was in 1985.

b. The parties' experts will testify to their opinions of the relative costs of the existing and alternative systems using the data and documents described in this Section III.F.

2. Cost Model Studies - Plaintiffs' Exhibits 8 and 9

a. To begin the cost model studies, IDES trained monitors who went to IDES offices and determined the time that various work required. The monitors issued reports for various functions such as those contained in P. Ex. 8. By analyzing the work done, IDES determined a minute per unit ("MPU") value for each task. IDES then estimated the number of such tasks that were required over a given period (typically a year) and thus determined the number of persons that were required to perform a particular type of work during a given year.

b. The raw data for a cost model study is summarized on step down tables, examples of which are included in P. Ex. 9. The acronyms on the step down sheets are defined in a glossary of the Handbook, a copy of which is P. Ex. 7.

3. Federal Funding Based On Cost Model Data- Plaintiffs' Exhibits 10 and 11

a. The cost model process is used by the USDOL to fund IDES, and other SESAs. P. Exs. 10 and 11 are the documents reflecting the federal funding for IDES for fiscal years 1986 and 1987 respectively.

Defendant's Exhibit 1 reflects the federal funding for IDES for fiscal years 1988, 1989 and 1990. The USDOL funding for staff is called personnel services and personnel benefits ("PSPB"). The USDOL funding for overhead is called non-personnel service needs ("NPS").

b. IDES is budgeted by functions which appear in the column (1) of the first page of P. Ex. 10 (1986).

c. Column (2) is a code number associated with each function.

d. Column (3) is the allocated MPU's (minutes per unit) associated with each function.

e. Column (4), "Workload," is the anticipated number of times each function will need to be repeated during the fiscal year.

f. Column (5) represents the number of staff years that must be paid to accomplish the function during the fiscal year given the allocated MPU's and the estimated workload. Staff years paid reflects both time actually at work and leave time (including, for instance, sick leave, vacation, and personal leave). The need for the time of one staff person for one year is called a personnel equivalent ("PE") or a full-time equivalent ("FTE").

g. Column (6) represents the number of staff years that USDOL estimates will be needed to accomplish the function. The difference between column (5) and

column (6) represents leave time associated with the staffing required to perform each function during the fiscal year.

h. The top of pages of P. Ex. 11 (1987) is a similar table reflecting FY 1987 allocations. The bottom of page 2 of P. Ex. 11 reflects a breakdown of tasks that comprise four of the functions.

i. In FY 1986, the USDOL paid $27,351 for each staff year. That number is reflected at the top of P. Ex. 10 (1986). It is an average of the costs of staff and includes not only base pay, but also benefits. (Clark at 9.) USDOL pays an additional amount for overhead associated with each staff position which for FY 1986 was approximately $6,660 per person.

j. In FY 1986, the USDOL funded 1834.83 PE's at IDES as reflected on the first page of P. Ex. 10. (The number includes a handwritten amount for administrative staff and technical ("AS&T") functions added and then reflected in the handwritten total.)

k. In FY 1987, the USDOL funded 1,884.56 PE's at IDES as reflected on pages 1 and 3 of P. Ex. 11. PE's in FY 1987 were funded at three different rates: $28,164 for regular staff, $26,788 for additional staff, and $31,422 for administrative support and technical staff. See p. 3 of P. Ex. 4 (Eggebrecht at 53). The handwritten amounts on p. 37 of P. Ex. 11 are

the salary alone without the costs of benefits. (Eggebrecht at 53.)

4. Cost Model Schematics - Plaintiffs' Exhibits 12 and 13

a. P. Exs. 12 and 13 are cost model schematics for initial claims functions and for wage record functions. This document breaks the cost of a function into its subparts. For instance, on the left of P. Ex. 12 (initial claims) is the MPU's for initial claims functions. The bottom number represents the total MPU's; the top number excludes that part of the MPU's for which IDES contracts with outside contractors, as represented by note "(4)." These numbers differ from those on P. Exs. 10 and 11 in that they represent the time IDES concludes from its studies that a task will actually take ("studied numbers" or "studied MPU's") whereas the figures on P. Exs. 10 and 11 represent the time that the USDOL will fund ("funded numbers" or "funded MPU's").

b. P. Ex. 13 is a cost model schematic of the wage record function.

IV. CONTESTED ISSUES OF FACT AND LAW

The central contested factual question is whether it is administratively feasible for IDES to use a different definition of the base period that would include the wages in the fifth

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STATEMENT
BY

GAY GILBERT
DEPUTY ADMINISTRATOR
OHIO BUREAU OF EMPLOYMENT SERVICES

ON BEHALF OF THE
INTERSTATE CONFERENCE OF EMPLOYMENT SECURITY AGENCIES

TO THE
HOUSE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON HUMAN RESOURCES

APRIL 24, 1997

Mr. Chairman and members of the Subcommittee, my name is Gay Gilbert. I am Deputy Administrator of the Ohio Bureau of Employment Services, and I am here today representing the Interstate Conference of Employment Security Agencies (ICESA). ICESA is the national organization of state officials who administer the nation's public Employment Service, unemployment insurance laws, labor market information programs and, in most states, job training programs.

I would like to thank Chairman Shaw for the invitation to present ICESA's views about the federal court's ruling in the Pennington case.

Background

To establish eligibility for unemployment benefits, an individual must have sufficient wages preceding the filing of a claim. The period surveyed for these wages is called the "base period."

Most states use a base period consisting of the first four of the last five completed calendar quarters. For example, if the claim were filed today, April 24,1997, the base period would be January 1, 1996, through December 31, 1996. Even if the individual had worked during all of the period from January 1, 1997, through April 23, 1997, the wages from this work would not be used to determine eligibility for a claim.

The first four of the last five completed calendar quarters is the most common base period. It reflects the public policy judgement that unemployment benefits should be paid only when the claimant has an established attachment to the labor force. In addition, almost all states determine eligibility for benefits using wage information which is reported by employers on a quarterly basis for all workers. It takes time for these reports to be completed and submitted by employers and for states to enter the information into state computer databases.

Outline and Status of the Pennington Case

As you know, the plaintiffs in Pennington are a class of claimants who were not monetarily eligible for unemployment benefits using the standard Illinois base period but would have been eligible had earnings subsequent to the first four of the last five quarters been considered. They contend that the Illinois base period violates the Social Security Act's requirement that administrative methods ensure that UI benefits are paid "when due."

In 1994, the Seventh Circuit Court of Appeals reversed the district court and ruled that individuals could sue under the "when due" clause to challenge a state's base period. The appellate court remanded the case to the district court for a determination as to whether the "when due" clause required Illinois to adopt an alternate base period for the plaintiffs. To make the determination, the district court was instructed to balance the plaintiffs' interest in prompt

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payment of benefits against the state's interest in minimizing administrative costs. The U.S. Department of Labor submitted an *amicus* brief to the court supporting the Illinois Department of Employment Security's position.

The Illinois DES appealed the seventh circuit's ruling to the Supreme Court which declined to hear the case in November 1994. Twenty-three states signed an *amicus* brief supporting Illinois' position.

On remand, the district court weighed four factors: 1) the number of additional eligible claimants there would be under an alternative base period; 2) the amount of additional benefits that would be paid; 3) the increased promptness with which eligible claimants would receive benefits; and, 4) the administrative costs of implementing an alternative base period. There was no consideration of the potential impact on employers in terms of additional costs or administrative burden. With respect to administrative costs, the court found IDES' evidence credible--the agency would incur more than $13 million in one-time costs and additional annual operating expenses of more than $2.5 million. The court also stated it was likely that federal funding to cover the costs would not be forthcoming. Nevertheless, the court concluded that the first three factors inured to the plaintiffs' benefit and outweighed the fourth. Accordingly, the court ruled that Illinois had to adopt an alternate base period for the plaintiffs.

Illinois appealed the district court's ruling; however, just a few weeks ago the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgement.

ICESA's Views

Our nation's unemployment insurance (UI) system is a unique federal-state partnership, grounded in federal law but executed through state law by state officials. The legislative framework created with the Social Security Act in 1935 gives states broad discretion to design their own unemployment insurance programs including determining the terms and conditions under which benefits are payable.

Prior to the court's interpretation in Pennington, Section 303 (a) (1) has been interpreted by the Executive Branch and by the courts since 1935 to mean that benefits should be paid as promptly as is feasible administratively under the terms and conditions of state laws.

Throughout the history of the unemployment insurance program, determining the period that constitutes the base period for unemployment insurance claims purposes has been one of many eligibility criteria ~~that federal law has left to the states~~. For example, each state--through its legislative process--decides the amount of earnings necessary to qualify for benefits, whether various reasons for voluntarily leaving a job constitute "good cause" and when the reasons for discharge from a job are such that an individual is disqualified from benefits.

The legislation establishing the unemployment insurance system in this country makes it clear that Congress intends for the states to have wide latitude in designing their unemployment compensation programs. That being the case, it is remarkable that the structures of state programs are so similar. This phenomenon can most likely be traced back to "draft bills" for state unemployment compensation laws that were provided to the states by the Department of Labor to illustrate legislation that would meet federal requirements. The base period that Illinois and most other states use was included in a draft bill that many states used as a model for their respective state laws. Therefore in establishing a base period consisting of the first four of the last five completed calendar quarters, states were assured that their law conformed to federal requirements. In addition, each year the Secretary of Labor must certify to the Secretary of the Treasury that each state's unemployment compensation law is in conformity with federal law in order for employers doing business in the state to claim the 90% offset credit against federal unemployment tax obligations. The Secretary has certified the Illinois law and the laws of other states with the same base period structure for almost 60 years.

We believe that the court's decision in Pennington is an implausible interpretation of the Social Security Act's requirement that administrative methods be designed to ensure the prompt payment of benefits when due and is inconsistent with the intent of Congress that states have wide latitude to design state unemployment insurance programs.

A number of states have put alternative base periods in place to address the circumstances of the plaintiffs in Pennington -- individuals who would not qualify using the first four of the last five quarters but who would qualify if more recent wages were used. ICESA believes that states should continue to have latitude to establish such alternatives or other standard base periods -- that the first four of the last five quarters is only one of a variety of base periods that states might use.

As technology that permits states to collect and process wage information more quickly becomes available, more states may wish to establish alternatives or more recent quarters as their base periods. However, purchasing the latest technology and implementing alternatives to standard practices are expensive. Administrative funding for unemployment insurance has been reduced substantially in recent years, and increases in the future to support practices such as alternative base periods do not appear likely. Right now states are directing scarce resources to making unemployment insurance computer systems Year 2000 compliant. Both UI benefit and tax systems contain numerous date-sensitive calculations which, if not modified to accommodate the century change, will have devastating consequences.

As you know, administrative funding for unemployment insurance is included under domestic discretionary spending caps although the program is an entitlement. There is currently no provision for increases in administrative funding for unemployment insurance under the discretionary caps--even though the number of beneficiaries who would be entitled to be served could increase substantially in an economic downturn.

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Implications

Earlier this year, California was sued in a Pennington-type suit. Other states may face similar lawsuits very soon. Losing a Pennington-type case would mean that if claimants do not qualify for UI benefits under the standard base period, an alternative period, such as the most recent 52 weeks or the most recent 4 quarters, would be used. Pennington could also be used as a precedent for lawsuits arguing that the "when due" clause requires an alternative base period whenever inclusion of more recent wages would yield a higher benefit amount. Pennington blurs the line between what SESAs can and cannot be sued for, potentially giving rise to further lawsuits against state employment security agencies regarding issues beyond base periods.

We are concerned that Pennington could establish a precedent for determination of other qualifying and eligibility requirements for state unemployment benefits by the judicial rather than the legislative process. Expansion of the courts' authority into setting qualifying and eligibility requirements for unemployment benefits preempts the democratic process and, as a result, is likely to erode public support for the program.

In the legislative process, discussions about qualifying and eligibility are not an entirely intellectual exercise. The practical implications, as well as the intellectual basis, of new provisions must be recognized because the legislative body bears responsibility for the outcome. For example, in a state where individuals in the same circumstances as the plaintiffs in Pennington are not eligible for benefits, legislators must explain to constituents why they are not eligible; in a state where an alternative base period is put in place, legislators must explain to their employer constituents that their unemployment taxes will be higher. In the legislative process, all interests must be weighed. The courts simply issue an opinion and take no responsibility for implementation.

Recommendation

In early January, Congressman Phil Crane (R-IL) introduced H.R. 125 which clarifies that individuals cannot file "when due" lawsuits to force changes in state base periods. It does not prohibit a state from adopting an alternate base period and does not take away from any claimant any right now enjoyed with respect to unemployment insurance.

We believe that it is in the best interest of the unemployment insurance system and the workers and employers it serves to maintain the historical interpretation of the Social Security Act's "when due" clause; that interpretation would be changed significantly if the Pennington decision stands. ICESA urges you to enact H.R. 125 making clear Congressional intent to leave establishment of base periods to the states.

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TESTIMONY
BEFORE THE HUMAN RESOURCES SUBCOMMITTEE,
HOUSE WAYS AND MEANS COMMITTEE,
BY
THE HONORABLE LYNN QUIGLEY DOHERTY,
DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,
ON BEHALF OF
THE HONORABLE JIM EDGAR,
GOVERNOR OF THE STATE OF ILLINOIS

April 24, 1997

Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to testify before you today. Once again, the State of Illinois is here to ask for your help in passing legislation to overturn the federal appellate court decision in *Pennington v. Didrickson*. That decision represents a 180-degree departure from the manner in which both the federal government and states have construed the Social Security Act, since that statute's enactment more than 60 years ago. It involves unelected federal judges in tax and spending policy that should be reserved to elected officials. Left standing, it could soon have a costly impact upon employers and state government in Illinois and aggravate the federal deficit by hundred's of million's of dollars. Its impact is already being compounded across the nation.

Background - State Base Period

Pennington is a class action lawsuit, challenging the provision of Illinois law that establishes the state's "base period." As you know, the base period is the period of time examined to determine whether an individual has earned enough wages to be eligible for unemployment insurance and, if so, the amount of the individual's weekly unemployment check. The base period in Illinois is the first four of the last five completed calendar quarters preceding the individual's filing an initial claim. To qualify for unemployment insurance in Illinois, an individual must have been paid at least $1,600 in wages during his or her base period, with at least $440 having been earned outside the quarter in which the individual's wages were highest.

Forty-nine other jurisdictions use the same base period as Illinois. Of those, eight have adopted alternate base periods for individuals who do not qualify using the standard base period. There are two reasons for the nationwide prevalence of the base period Illinois uses.

First, a base period of the first four of the last five quarters generally ensures that unemployment insurance will be available for workers with a genuine attachment to the labor force, but not necessarily for those with only a marginal connection.

The legislative history of the Social Security Act indicates that unemployment insurance was intended to be limited to individuals with established ties to the workforce. According to a 1935 report by the Committee on Economic Security, which drew the blueprint for today's unemployment insurance system, unemployment insurance was intended for the "ordinarily steadily employed." The Ways and Means Committee's report on the Social Security Act noted the program was not intended to provide relief for everyone who was out of work.

Congress' intent still makes sense today. Unemployment insurance is funded almost exclusively by employers. In Illinois, it is funded 100 percent by employers. Employers alone should not bear the burden for individuals with little or no attachment to the world of work.

Second, a base period like Illinois' streamlines administration and minimizes the risk of fraud. Within a month following the close of each quarter, Illinois employers provide the state with reports on the wages paid to their workers during that quarter. The state uses those reports to verify that claimants are monetarily eligible for unemployment insurance. With Illinois' base period, all reports needed to verify an individual's eligibility should already be in the state's computer system when the initial claim is filed.

***Pennington* Lawsuit**

The plaintiffs in *Pennington* are demanding that the federal court broaden eligibility for unemployment insurance by requiring Illinois to adopt multiple base periods. They argue the Social Security Act grants federal judges the authority to do so. Specifically, they maintain that anyone who has not earned $1,600 over the 12 months included in the base period, or has not earned $440 outside the high quarter, should be able to try to establish eligibility through an alternate base period using the last four quarters.

When the case was first heard in district court, the judge agreed with Illinois that, as part of the state's monetary eligibility requirement, Illinois' base period could not be challenged in litigation under the Social Security Act. However, in *Pennington v. Didrickson*, the appellate court reversed and remanded the case, to determine whether Illinois had to adopt multiple base periods.

To make that determination, the appellate court instructed the district judge to balance the benefits which some claimants could derive from the alternate base period against the state's interest in holding down administrative costs and minimizing fraud. On remand, the district judge determined the claimants' interests outweighed the state's and, therefore, that Illinois had to adopt the alternate base period. Just recently, the appellate court affirmed the district judge's determination. Illinois will petition the Supreme Court to hear the case. That petition will include the same argument I make to you today.

With all due respect, the appellate court was wrong when it held federal judges could decide the type and number of base periods a state was to have. It was wrong for a number of reasons. The legislative history of the Social Security Act indicates Congress intended states to have broad freedom to set up the types of unemployment insurance systems they considered appropriate.

The United States Supreme Court has held that the Social Security Act was intended to recognize the importance of each state establishing its own eligibility criteria for unemployment insurance.

In addition, since the establishment of the unemployment insurance system, the Labor Department - the federal agency charged with enforcement of the Social Security Act as it pertains to unemployment insurance - has considered a base period of the first four of the last five quarters to be consistent with the Act. As you will recall, the last time this Subcommittee considered the consequences of *Pennington*, the Labor Department did not depart from its longstanding position that the type and number of base periods employed by states are matters for state policy makers.

In the 1970's, Congress itself expressly recognized and took no issue with the states' widespread use of base periods consisting of the first four of the last five quarters.

Beyond all that, however, the appellate court was wrong because its decision vests unelected federal judges with the authority to substitute their judgment for governors and state legislatures with regard to tax and spending policy. The balancing test it prescribed is essentially a policy judgment of the type that governors and state legislatures are elected to make and are better-suited to make. The appellate court's ruling has separated the authority to make policy decisions from accountability for those decisions, with potentially expensive consequences.

Potential Illinois Impact of *Pennington*

In deciding the case on remand, the district judge noted that the administrative costs of the alternate base period sought by the plaintiffs could be substantial - million's of dollars in one-time costs and $2.5 million in additional yearly operating expenses according to the Department of Employment Security. He also acknowledged that additional federal dollars to cover those costs were not likely to be forthcoming. He did not, however, concern himself

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with where the money to cover those costs would come from or with any of the other significant implications of what the plaintiffs want.

Besides finding the money to implement the plaintiffs' scheme, Illinois would also have to find the time and personnel, inasmuch as the State is already in the middle of two major automation projects for the benefit of claimants: overhauling its extensive mainframe computer system to enable it to continue running in the year 2000 and beyond and implementing a telephone certification system. The telephone certification project is a streamlining initiative that will eliminate the need for claimants to mail paper forms to the State to certify as to their continued eligibility for benefits. As an aside, implementation of the plaintiffs' multiple base period scheme would negate most, if not all, of the cost savings anticipated from telephone certification. The year 2000 project is necessary to ensure the State remains able to pay benefits at all.

In addition to the administrative burden it would impose on state government, *Pennington* could also substantially raise outlays from Illinois' Unemployment Trust Fund account and impose hefty increases in employer taxes.

The Department of Employment Security estimates the alternate base period the plaintiffs are seeking would increase Illinois' Trust Fund outlays by 1.5 percent. A Labor Department study indicates alternate base periods raise state Trust Fund outlays by four to six percent. A 1.5-percent increase in outlays from Illinois' Trust Fund account would on average amount to around $20 million per year; a six-percent increase would approach $100 million, annually.

As state law is currently written, additional outlays would automatically trigger tax increases for Illinois business. A 1.5-percent increase in outlays would result in an employer tax hike averaging nearly $10 million per year. A six-percent increase in outlays would raise employer taxes by over $40 million each year.

Since state Trust Fund accounts are part of the unified federal budget, the difference between the increased outlays and the higher taxes would translate into an increase in the federal deficit - a more than $100-million increase over the next eight years if outlays rose by 1.5 percent; a $400-million increase if outlays rose by six percent .

Alternatively, the State could face pressure to offset the increased payouts resulting from *Pennington* by cutting benefits elsewhere.

In any case, determining eligibility based on wages earned after the first four of the last five quarters would require additional reporting from employers to verify the earnings, thereby imposing substantial new "paperwork burdens."

Potential National Impact of *Pennington*

Pennington's impact in Illinois, including its effect on the federal deficit, could presage things to come for nearly every other state. The appellate court's decision is binding in Indiana and Wisconsin, as well as Illinois, and can be used as precedent to attack other states' unemployment insurance laws. As you know, a *Pennington*-type suit has now been brought against the State of California, as well.

The California litigation demonstrates the inherent difficulty of leaving to judicial fiat the type and number of base periods a state is to use. In the California case, the plaintiffs are demanding an alternate base period of the last 52 weeks. Consequently, even if Illinois were to adopt the multiple base period scheme the *Pennington* plaintiffs are after, the State would still be exposed to further lawsuits by different plaintiffs who wanted still other alternate base periods to accommodate their particular needs.

Moreover, *Pennington's* use as precedent will not necessarily be limited to cases where an alternate base period is the difference between eligibility and ineligibility. States can

expect the argument that the Social Security Act requires an alternate base period when an alternate base period would yield a higher weekly benefit check. *Pennington* has blurred the line between what a state can and cannot be sued for under the Social Security Act.

Last year, as you know, the Congressional Budget Office estimated that, if implemented nationally, the multiple base period scheme the *Pennington* plaintiffs are seeking could raise outlays from the federal treasury by more than $350 million per year. That figure would rise dramatically as litigants' demands for different base periods multiplied.

In the friend-of-the-court brief it submitted to the appellate court, the Labor Department said, "Given the widespread use of the type of base period employed by Illinois, an order striking down the Illinois law undoubtedly would cause nationwide disruption in the various states' unemployment compensation systems."

The case's implications beyond Illinois' borders prompted 23 states to join Illinois in requesting Supreme Court review of the appellate court's decision in *Pennington v. Didrickson*.

Conclusion

The type or number of base periods a state uses is not the litmus test of the fairness of that state's unemployment insurance system. For example, in each of the eight states that have adopted the alternate base period sought by the *Pennington* plaintiffs, the amount necessary to qualify for benefits is substantially higher than in Illinois - up to twice as much. A state's base period structure is simply a partial reflection of how that state's policy makers have decided to allocate the system's limited resources to best serve the interests of everyone whom the system was established to serve.

My specific request to you is for legislation to clarify the Social Security Act does not govern state base periods. I am not asking you to prohibit the use of multiple base periods or to take away any rights now enjoyed by any claimant. The legislation I am seeking will simply eliminate the need for further costly litigation. Consistent with the intent of the unemployment insurance system's architects, it will also ensure that requirements as to eligibility remain a decision for state policy makers, who are directly accountable to the people who will be impacted by that decision.

I look forward to working with you toward a speedy resolution of this issue.

Thank you again for your time and consideration.

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TESTIMONY
BEFORE THE HUMAN RESOURCES SUBCOMMITTEE,
HOUSE WAYS AND MEANS COMMITTEE,
BY
ALBERT R. MILLER, PRESIDENT,
PHOENIX CLOSURES, INC.

April 24, 1997

Thank you, Mr. Chairman and members of the Subcommittee. My name is Bert Miller. I am the President and chief operating officer of Phoenix Closures. My company is located in Naperville, Illinois and produces container caps for regional and national brand products, both domestic and international. Our customers cover a wide array of markets, including foods, household chemicals, cosmetics, health care products, industrial products and pharmaceuticals. Phoenix Closures presently employs more than 200 workers and has been an Illinois employer for over 100 years.

I am here today to express my strong support for the legislation Governor Edgar and Director Doherty are seeking in connection with the *Pennington* case.

There are problems both with the alternate base period itself and the manner in which it would be implemented if *Pennington* stands. The *Pennington* alternate base period would provide for the payment of unemployment benefits, financed exclusively by employers, to individuals with no established connection to the workforce. To that extent, it would begin to turn the unemployment insurance system into a 100-percent employer-financed welfare program - something well beyond what I understand to have been Congress' intent and something employers cannot afford.

By increasing outlays from Illinois' Trust Fund account, the alternate base period would also raise employer taxes. The greater the rise in outlays was, the higher the tax increase would be. The lowest estimate I have seen is that the alternate base period would increase outlays from Illinois' account by 1.5 percent. An increase of that size would raise employer taxes by around $10 million per year. There is a Labor Department study that estimates an alternate base period can raise a state's Trust Fund outlays by four to six percent. A six-percent increase in outlays from Illinois' account would raise taxes on Illinois business by $40 million each year.

The alternate base period's cost to employers, however, would not be limited to higher taxes. I understand employers would also be faced with additional reporting requirements, with penalties for noncompliance, to verify claimant earnings that had not yet been reported and entered into the state's computers.

To put that into context, permit me to discuss briefly my own company's situation. Phoenix Closures is a longtime Illinois business run by a longtime Illinois family. Our success is built on the strong partnership we have with our employees and their union - the United Needle and Textile Employees Union, AFL-CIO. The company's employees are also its neighbors, and Phoenix Closures intends to remain committed to them and its home in Illinois. However, we face intense competition from businesses whose roots are not as firmly fixed. Many of our competitors have moved to more rural parts of the country, to take advantage of low wages. In the last three years, four of our competitors have established plants in Mexico.

Phoenix Closures has remained competitive by substantial investments in high-tech equipment, in training for our employees to run that equipment and in doing our level best to hold the line on costs whenever possible.

In that environment, court orders that raise taxes by as much as $40 million per year and compound government-imposed paperwork are not just dispiriting. For many businesses like ours, a system that allows things like that will ultimately be deadly.

The alternate base period's costs, however, would not just fall on employers. I am also troubled by the potential impact on government - million's of dollars in start-up costs and $2.5 million in extra annual costs according to the Department of Employment Security, with no identifiable source to cover those costs. I have been a consistent advocate of the idea that government needs to work a whole lot smarter and cheaper than it does right now. However, no entity can achieve that result if it just keeps taking on more and more things to do. The alternate base period just gives government one more thing to do and takes us further in the wrong direction.

Besides the problems with the idea of an alternate base period, I am deeply troubled by the fact that, as the *Pennington* case has transpired, employers have been completely shut out of the process. As things stand now, most of my concerns will never even enter into the debate. According to both the district and appellate courts, the only relevant considerations in deciding whether a state is to be ordered to adopt an alternate base period are how much more would be paid in benefits and what the impact would be on government's operating expenses. The cost to employers, in terms of higher taxes and additional paperwork, will simply not count. Employers will not even be able to have the satisfaction of voting against the judge who ordered the alternate base period. Mr. Chairman, employers are the ones who pay for the system; our concerns should at least be considered relevant to the discussion.

The legislation Illinois is seeking is simple. It will just make sure that the decision as to whether the benefits of an alternate base period justify its costs remains one for policy makers who will be accountable to the people the decision will affect and that, as the costs and benefits are weighed, all sides' concerns are given their due. I respectfully ask you to support it.

Thank you for you taking the time to have this hearing today and for considering my views.

Testimony of

JANET L. NORWOOD
Senior Fellow, Urban Institute

before the

Subcommittee on Human Resources
Committee on Ways and Means
U.S. House of Representatives

Washington, D.C.

April 24, 1997

Testimony of

JANET L. NORWOOD
Senior Fellow, Urban Institute[1]

before the

Subcommittee on Human Resources
Committee on Ways and Means
U.S. House of Representatives

April 24, 1997

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to discuss the nation's unemployment insurance program with you this morning. As you know, I chaired the Advisory Council on Unemployment Compensation (ACUC), having been appointed to the Council by both Presidents Bush and Clinton. The Council, established in Section 908 of the Social Security Act as amended, had 11 members appointed by the Congress and the President who, by law, were representatives of state governments, business, labor, and the public. The ACUC reviewed the entire Unemployment Insurance (UI) program, held meetings and public hearings in different parts of the country, visited state offices, and met with groups of businessmen and with workers seeking benefits. Members of the Council also visited a number of state UI offices and staff at the U.S. Department of Labor. The Council convened two economic research conferences and sponsored a legal symposium to facilitate the exchange of ideas and to ensure a full understanding of the operation

1 Any opinions expressed herein are solely the author's and should not be attributed to the Urban Institute, its officers, or funders.

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of the UI program. The three reports of the Council contain, I believe, a useful summary of the operation of the program -- both the parts that are working well and areas which could be improved. Although many different perspectives were represented on the Council, most of the recommendations were unanimous.

The nation's system of unemployment insurance is now more than 60 years old. As the oldest federal-state cooperative program, it has served the nation well and, in fact, should be seen as a prime example of cooperation between the states and the federal government. The UI program provides economic security to millions of American workers who, through no fault of their own, are temporarily laid off or permanently lose their jobs. We should ensure that the program continues to meet the needs of workers in a labor market that is considerably different from that of the past.

Our country's labor force today is much more diverse, made up of men and women, skilled and unskilled, minorities and immigrants. More than 136 million people are in the labor force, and the labor force participation rate has climbed to over 67 percent. Almost 8 out of every 10 workers are employed in a service-producing industry. Factory workers, who were the prime recipients of UI benefits when the program began, today make up only 20 percent of nonagricultural employment. Part-time work has become more prevalent, much of it because people prefer it, but more than 4 million workers are forced to work part-time because full-time jobs are not available. In addition, nearly 8 million workers (6.1 percent of all employed workers) were multiple jobholders, that is, they held more than one job.

The fact that the unemployment rate -- at 5.2 percent -- is relatively low and that job creation continues makes this a very good time to review the UI program. This is a period when the demands on the UI system are relatively low and when, therefore, we should be planning for the future. It is important to note that according to data for the first week in March, only 37.4 percent of the unemployed in our labor force survey are receiving UI benefits. There are many reasons for this discrepancy, of course, since the UI system does not cover new entrants to the

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labor force or those long-term unemployed who have already used up their benefits. Nevertheless, the long-term downward trend in recipiency since 1947 shows that the UI program has been serving a decreasing proportion of the unemployed.

The ACUC made a number of recommendations for improvement of the system, and they are all useful. But I would like to focus my testimony this morning on two issues that I consider especially important. The first is the sharing of responsibility between the federal government and the state governments and the solvency of the UI trust funds. The second is the treatment of part-time and low-wage workers.

Defining the Federal and State Roles in the Unemployment Insurance System

The nation's unemployment insurance system is one of shared responsibilities and powers. It is important that those responsibilities be shared effectively so that the interests of the states and of the nation as a whole are best served. The federal government has a responsibility to protect the national interest in cases where the interests of the states do not coincide with those of the federal government. In cases where the interests of the two levels of government coincide -- which is very often the case -- the program should be left to the states. The ACUC made a number of specific recommendations about activities in the program which should be left to the states. Our report laid out a useful conceptual foundation for dealing with the responsibilities of the two levels of government in programs which must have the cooperation of both to succeed. I believe that the research that we did on this issue can be applied to many other programs and that the UI system should be seen as a useful model as we move more responsibility to state governments.

The Council found that the federal government had a responsibility to protect essential national interests in seven areas and to leave most responsibility for other areas to the states. The recommendations were that the federal government should: (1) ensure that each state maintains a UI system: (2) promote forward funding of the UI system: (3) coordinate the collection of labor

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market information and the monitoring of developments; (4) maintain supplemental benefit programs that trigger on automatically in recessions, thereby avoiding costly federal emergency benefits; (5) coordinate a more efficient pooling of risk through loans to states with serious recessions; (6) assure the eligibility of workers with labor force attachment for a minimum level of benefits; and (7) promote the efficiency and quality of program outcomes.

In other areas, the Council found that program details could best be left to the states. We recommended that many federal laws, regulations, and federal oversight be changed to leave the states unencumbered in areas best handled by them. For example, states should determine whether to disqualify certain groups of workers (i.e., school employees between terms or professional athletes), whether benefits should be reduced if workers received retirement benefits, and a variety of oversight functions about performance outcomes.

Our research showed that the pressures under which many of the states were operating encouraged a "race to the bottom," which affected two extremely important areas -- trust fund solvency and low-wage workers. Although some states maintained a degree of forward funding of the trust funds, others did not. Since one important purpose of the UI program is the provision of purchasing power during an economic downturn, the federal government has a responsibility to ensure that this is done. State trust funds must be adequately maintained in good times so that when recession hits, payments can be made to the workers who need them. The funds needed for these payments should be secured in periods of economic expansion and not in the midst of an economic downturn. I am concerned that insufficient attention is currently being given to building up the trust funds in some states now while we are in an economic expansion for use during some future recession.

Low-Wage Workers

Research conducted by the Council staff found that the competitive pressures among the states to attract business could well lead to a continued decline in the percentage of unemployed

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workers who received benefits. We were concerned to find that this problem disproportionately affected low-wage workers. When a state experiences insufficient trust funds to cope with the demand from workers entitled to benefits, often the first step taken is to tighten eligibility for those benefits. The brunt of this tightening hits especially those working part time and those earning low wages. For example, our research found that a minimum wage person who worked half time or for 20 hours each week the year round would not qualify for UI benefits in nine states. But a comparable part-time, full-year worker earning $8.00 an hour would qualify in all states. The point is that a worker with strong labor force attachment can be disqualified for UI because his earnings were too low. In the same way, we found that a worker employed two days per week for a full year at the minimum wage would not qualify for benefits in 29 states. But that worker would be eligible in all but two states if his earnings were $8.00 per hour. Thus, low-wage and part-time workers are disqualified either because of their low earnings or because they work only part time.

The ACUC report for 1995 declared: "Because of the structure of earnings eligibility requirements, low-wage, part-time workers must work more hours to qualify than higher-wage workers." This means that the system in some states discriminates against the working poor, exactly the group we most need to help in our society. I believe that this is an issue that will become more important as an increasing number of people move from welfare to jobs as the result of the recent welfare legislation. The former welfare recipients tend to have little labor force experience and frequently do not have much training; they can, therefore, be expected to suffer more spells of unemployment than the rest of the labor force.

Mr. Chairman, I have focused my brief remarks on only a few of what I believe to be among the most important issues covered by the careful study and review of the Advisory Council. I should be happy to try to answer any questions you may have.

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_____. *Defining Federal and State Roles in Unemployment Insurance*. A Report to the President and Congress, January 1996.

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REFER TO

NOV 25 1996

November 21, 1996

The Honorable Patrick Johnston
California State Senate
P.O. Box 942848
Sacramento CA 94248-0001

Dear Senator Johnston:

This letter responds to your request for information regarding an alternate base period for individuals filing for Unemployment Insurance (UI) benefits. I apologize for any confusion or delay in your receipt of this information. It was my understanding that written answers to some of the questions posed in your letter have previously been provided to your staff while, as you note in your letter, other information was discussed informally. Finally, some of the questions raised in your letter required additional research and preparation which delayed our response.

In your letter you asked for information on the feasibility of instituting an alternate base period for individuals who can establish a claim for UI benefits only if their most recent earnings are considered under two specific scenarios; a base period comprised of the last four completed calendar quarters prior to the application for benefits, and a base period comprised of the 52 weeks prior to the application for benefits.

Specifically you inquired how these scenarios would affect:

- administrative costs;
- the number of claimants who would receive benefits sooner;
- the number of claimants who would receive benefits they otherwise would not collect;
- the dollar amount of benefits that would commence sooner;
- the dollar amount of increased benefits paid;
- the additional costs to the UI Fund;
- the additional number of welfare recipients who would be covered by the UI system; and,
- the welfare savings generated by increased coverage through the UI system.

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In order to answer these questions we developed estimates based on two separate, random 5,000 claim samples of valid and invalid claims (using the current method of determining a base period). The two samples were used to identify the number of claimants with invalid claims who would have valid claims under the new base period as well as those claimants with invalid claims who ultimately filed a valid claim once their wages appeared in the base period. The results of these samples were then applied to the 2.06 million claims filed in 1995.

The projections contained in this response were developed from data compiled before the recent statutory minimum wage increases. Since the amount of UI benefits available to a claimant is based on earnings during the specified four quarter base period, these increases will result in additional base period earnings for minimum wage workers. While the total effects of the minimum wage increases cannot be predicted due to constraints in the way employers report the wage information, generally these increases will have the effect of raising the Weekly Benefit Award for those claimants who minimally qualify for a UI claim and may decrease the total number of invalid claims.

Last Four Completed Calendar Quarters Prior to the Application for Benefits

If the base period were changed to the four most recently completed quarters, 76,140 claimants potentially would have been paid $121.1 million sooner than they would have otherwise received under the current base period. However, some of these claimants actually filed valid claims once their wages were included under the current base period. If this figure is adjusted to account for these claimants, a net total of 30,241 persons who did not have sufficient wages to establish a claim under the current system would have been paid $36.5 million under the most recently completed four quarter scenario.

Additional administrative costs to implement an alternative base period comprised of the four most recently completed quarters for claimants with invalid claims under the current system would be $7.8 million annually. This, coupled with the $36.5 million of annual increased benefits paid would bring the total cost to the UI fund for such a base period system to $44.3 million per year.

In order to answer your questions about the number of welfare clients who might be covered by UI under an alternative base period, and the savings this increased coverage might generate, we compared the number of individuals in the sample of invalid claims who would have been eligible for a UI claim under a base period of the four most recently completed quarters with the Medi-Cal Eligibility Determination System (MEDS) file. (The MEDS file is the Department of Health Services file on individuals collecting welfare benefits in California). We then extrapolated this comparison to the total number of invalid claims filed in 1995. This comparison showed that 16,357 of the individuals who were collecting welfare benefits and would have been eligible for a UI claim under a base period comprised of the four most recently completed quarters would have collected $23.7 million in UI benefits, offsetting a like amount in welfare costs.

52 Weeks Prior to the Application for Benefits

If the base period were changed to the most recently completed 52 weeks prior to the date of filing, 121,824 claimants potentially would have been paid $233.4 million sooner than they would have otherwise received under the current base period. Adjusting this figure to account for claimants who actually filed valid claims once their wages were included under the current base period, a net total of 48,364 persons who did not have sufficient wages to establish a claim under the current system would have been paid $92.7 million under the most recently completed 52 week scenario.

Additional administrative costs to implement an alternative base period comprised of the 52 most recently completed weeks for claimants with invalid claims under the current system would be $12.2 million annually. This, coupled with the $92.7 million of annual increased benefits paid would bring the total cost to the UI fund for such a base period system to $104.9 million per year. Comparing the data generated under the most recently completed 52 week scenario with the MEDS file showed that 28,200 of the individuals who would have been eligible for a UI claim under a base period comprised of the 52 most recently completed weeks would have collected $40.86 million in UI benefits and offset this amount in welfare costs.

A table summarizing the effect of implementing an alternate base period for claimants with invalid claims under the current base period for the two scenarios you proposed has been included for your reference.

I would point out, however, that the information presented in response to your questions reflects the costs associated with establishing an alternative base period for only those claimants with invalid claims under the current base period. These costs would be incurred in addition to the costs associated with maintaining the current system for those individuals who qualify for UI benefits under that system. Additionally, some claimants who qualify for benefits under the current system would benefit monetarily if more recent earnings were considered. Although not discussed in this response, one alternative to address the administrative burden of a dual system, as well as any perceived inequity from the perspective of the claimant, would be the extension of an alternative base period to apply generally to all claimants.

Information about potential increased employer costs associated with the collection of the additional wage information necessary under either base period scenario is also not included. Under either of the two scenarios you propose, ad hoc collection of wage information from employers, over and above that which is already reported quarterly, would be required. In addition, the collection of wage data under the most recent 52 week base period scenario is significantly more involved than that which would be required under the most recent four quarter scenario. The 52 week base period scenario would require that all wages in the base period be verified through contact with the employer. This creates a substantial burden on employers to provide wage data on request and is likely to result in strong employer opposition.

Currently, the Department is moving to expedite the processing and posting of quarterly wage information to the Base Wage File (BWF). The lag time between the beginning date of a claim and the last quarter of the base period under the current system is necessary to allow for receipt of the employer provided information and the posting of that information to the BWF. The Department is working to accelerate the processing of the wage data it receives from employers. A problem remains with the technological limitations of the old BWF system. The Department is working with Franchise Tax Board to improve the quality of the data and explore ways for both Departments to share information in the BWF. This effort is scheduled to be completed in July 1998. The new system will accommodate a flow process that will increase the speed of the processing and the accessibility

of the information as it moves through the system. Until the conversion is completed, the lag time between receipt of information from the employer and having the information accessible for use in computing benefits will not change significantly. However, once these improvements are implemented, the collection of the additional wage information necessary under the most recently completed four quarter based period would be minimized.

This means that the costs associated with implementing an alternative base period comprised of the most recent 52 weeks, whether for all claimants or just those with invalid claims under the current base period, are considerably higher than those associated with implementing a base period comprised of the four most recently completed quarters.

Thank you for the opportunity to respond to your questions. We share your interest in the issue of how, in light of welfare reform, UI benefits can provide a more effective safety net for those who have an attachment to the labor market. If you would like to further discuss the information contained in this letter or the implications and costs of either of the scenarios you propose, please contact Darlene Atkinson, Deputy Director of our Legislative Liaison Office at 654-8799.

Sincerely,

AL LEE
Chief Deputy Director

Selected Effects of an Alternate Base Period for Claimants with Invalid Claims		
Question	Last Four Completed Quarters	Last 52 Weeks
What are the administrative costs?	$7.8 million	$12.2 million
How many claimants would receive benefits sooner?	76,140	121,824
What is the number of claimants who would otherwise not receive benefits?	30,231	48,364
What is the dollar amount of benefits received sooner?	$121.1 million	$233.4 million
What is the amount of increased benefits paid?	$36.5 million	$92.7 million
What is the cost to the UI Fund?	$44.3 million	$104.9 million
How many additional welfare recipients would be covered?	16,357	28,200
What welfare savings are generated?	$23.7 million	$40.86 million

October 1962

(Relevant Portions)

Unemployment Insurance Legislative Policy

Recommendations for State Legislation 1962

U.S. DEPARTMENT OF LABOR
W. Willard Wirtz, Secretary

BUREAU OF EMPLOYMENT SECURITY
Robert C. Goodwin, Administrator
Washington 25, D.C.

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PREFACE

This statement of unemployment insurance legislative policy and recommendations for State legislation is a revision of the 1953 document, Unemployment Insurance Policy, Benefits - Eligibility. It has been prepared to meet the need for an up-to-date summary of legislative policy. It is intended primarily as a general policy guide and reference tool for the use of the staffs of the State employment security agencies and the Bureau's national and regional offices who are concerned with the preparation or review of legislative amendments to the benefit and eligibility provisions of the State employment security laws. It is hoped that the discussion will be useful also to labor and employer organizations and to other groups and individuals interested in unemployment insurance legislation.

A discussion of disqualifying income, which was included in the 1953 document, was not completed in time for release as part of this revised statement. It will be issued at a later date. Policy statements on other aspects of the employment security program, such as coverage, financing, appeals, and administration, also need to be updated. The Bureau plans to prepare and issue supplementary statements of policy on these subjects.

Although the Manual of State Employment Security Legislation, revised September 1950, is still the principal compendium of legislative language, the illustrative benefit schedules in the commentary of the Manual are now out of date and no longer suitable for reference purposes. Accordingly, new benefit schedules and other technical discussions and illustrations have been included in the Appendix of the revised statement.

Other legislative aids which should be consulted include Unemployment Insurance Purposes and Principles, issued in December 1950 as "a guide for evaluating the main principles of unemployment insurance laws"; Adequacy of Benefits Under Unemployment Insurance, BES No. U-70(R), issued in October 1958; and the Comparison of State Unemployment Insurance Laws as of January 1, 1962. The first two documents include criteria for appraising employment security laws; the third document will supply information on the provisions of the State laws. Copies of these documents are available from the Bureau of Employment Security.

October 1962

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II. BASE PERIOD AND BENEFIT YEAR

The base period and benefit year constitute the framework of the benefit formula. Unemployment insurance can be thought of as term insurance. Rights are established during the base period by workers in the labor force, to be used in the event of their unemployment during their benefit year. The base period is the period of the claimant's previous employment experience in insured work used as the base for determining if he is "insured" under the program, his weekly benefit, and maximum annual benefits. In all States except Wisconsin, the base period is related to a later period, the benefit year, in which benefit rights based on the claimant's base-period employment may be used. A base period is fixed in relation to the beginning of a benefit year; once established, it remains unchanged for the duration of the benefit year. Under most laws, a determination of weekly benefit amount and maximum annual benefits, once made for an individual, remains unchanged throughout the benefit year.

Types of Periods

Both the base period and the benefit year are of two main types, "individual" and "uniform."

Individual periods.--The individual benefit year, in most States, is a 1-year period beginning on the day with respect to which an individual first files a new claim, providing he has sufficient wages to be insured. In some States, however, there are additional requirements a claimant must meet (see page 5).

A variation which has been used is an individual benefit year beginning with the calendar quarter in which a valid claim is filed. Such a provision is not recommended, since it treats differently claimants whose unemployment begins early and those whose unemployment begins late in a calendar quarter. For example, a claimant filing in the last week of a quarter would have an effective benefit year of 40, rather than 52, weeks. This may be an advantage or a disadvantage to a claimant depending on the chance pattern of his unemployment and reemployment during the benefit year.

Since the base period is related to the benefit year, an individual base period is ordinarily related to the beginning of the claimant's unemployment. It is a characteristic of the individual base period that the earnings used to compute benefit rights are relatively recent. For this reason, the Bureau recommends the individual benefit year. The discussion of lag between base period and benefit year (page 4) indicates various types of individual base periods.

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Uniform periods. In a few States, the benefit year begins for all eligible claimants on the same day--i.e., the first day or the first Sunday of a specified month--and continues until the corresponding day in the next calendar year. A claimant who files a claim near the expiration of a uniform benefit year does not have any opportunity to draw all the weeks of benefits to which he may be entitled on the basis of his base-period employment and wages. However, such a claimant would ordinarily have benefit rights in the succeeding benefit year and could draw benefits based on a new determination of his rights.

In the States which use a uniform base period, it is defined as the calendar year preceding the beginning of the uniform benefit year.

Length of the Base Period and Benefit Year

The base period of 1 year (or 4 quarters or 52 weeks) used in all State laws at present is recommended. A 1-year base period usually reflects an individual's recent year-round employment pattern. However, under certain circumstances, it may not be representative of his normal attachment to the labor force. For example, an individual with a long history of almost full-time employment may experience considerable unemployment in a 1-year period because of illness or recession and may not qualify for benefits despite his work history and his current attachment. Without changing the base period, it is possible to admit such an individual to benefits under an alternative qualifying requirement that takes into account his employment not only in the 1-year base period but also over a longer period (see page 52).

Although a number of State laws provide for a 52-week individual benefit year, this type of period should not be used with a formula which provides for a 4-quarter base period. Since the 52-week period is 1 or 2 days short of a full year, it can result, when one benefit year immediately follows another, in the inclusion of the same calendar quarter of wages in each of the two base periods for such benefit years. (For a further discussion, see page A-1.)

Since the end of a benefit year and the end of a benefit week do not necessarily coincide, provision should be made for the allocation of split weeks to a specific benefit year. This may be done by allocating the weeks to a year by one of the following means: all weeks beginning in the benefit year, or all weeks ending in the benefit year, or all weeks of which four or more days fall within the year. Such allocation, which is made necessary by the fact that the unit of payment in the program is a week, should not change the ending or the beginning dates of benefit years as fixed by statute. It is preferable to provide statutory authority to handle this by regulation because administrative flexibility is desirable.

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Lag between Base Period and Benefit Year

Since unemployment insurance is designed to compensate wage loss, benefits should be based upon comparatively recent wages--i.e., the lag between the base period and benefit year should be as short as possible. As illustrated in Table 1 (page A-2), the lag varies widely with the type of period used and the manner in which wage information is obtained. (For discussion of a system of wage reporting that will permit reduction or elimination of the lag, see page 6.)

Lag with individual periods.--Under the most common definition of an individual base period (first 4 of the last 5 completed calendar quarters the interval between the end of the base period and the beginning of the benefit year (3 months to 1 day less than 6 months) is intended to allow time for the recording of all base-period wages prior to the beginning of a benefit year. Such a provision allows a minimum lag of 1 quarter between the base period and the benefit year. Since wage reports are usually received 1 month after the close of a quarter, they must be processed in the remaining 2 months to be available by the beginning of the quarter in which they may be needed for the computation of benefit rights.

A few States allow 1 month more for wage processing by defining the base period as the first 4 of the last 5 completed calendar quarters preceding a benefit year which begins in the second or third month of any quarter and the first 4 of the last 6 calendar quarters preceding a benefit year which begins in the first month of any quarter. However, this permits a lag period of 7 months during 4 months in the year, and a lag period in excess of 6 months is undesirable. For this reason, the Bureau recommends against such a definition of the base period.

Lag with uniform periods.--The uniform calendar base year and a benefit year beginning April 1 or July 1 involve a lag of 3 or 6 months between the end of the base period and the beginning of a benefit year. This means a lag of up to 15 to 18 months between the end of a base period and the beginning of some claimants' unemployment. When uniform periods are used, a claimant's weekly benefit may be based on wages earned as long as 2 years ago and is, therefore, unlikely to be realistic in terms of his more recent wages.

In spite of the simplification involved in the use of the same year as the base period for all claimants who file claims in a corresponding benefit year, such a uniform period is not recommended for the following reasons: (1) Wages used in the computation of benefits are more remote and, therefore, less indicative of the claimants' degree of recent attachment to the labor force than when a more recent base period is used; (2) Claimants are affected unevenly, depending upon when their employment began in relation to the beginning of the base period and when their unemployment began in relation to the beginning of the benefit year; (3) New entrants to the labor force must wait longer than when individual periods are used before they are afforded the protection of

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the program; (4) I: w entrants earn less than the imum qualifying mount in their first uniform base period, these wages are lost for benefit purposes. Under laws providing for individual periods, these wages can be used in combination with later earnings as a basis for benefits.

Administratively, a uniform base period and benefit year build up a peak load of claims at the beginning of the benefit year or just before it. The new claims load goes up because, in addition to claims from workers just becoming unemployed, the agency gets new claims from claimants receiving benefits at the end of the old benefit year, from those who exhausted their benefit rights in the old benefit year and have remained unemployed, and from those who were unemployed but not insured in the old benefit year and may be insured in the new benefit year.

Definition of "Valid Claim" to Begin an Individual Benefit Year

A valid claim is a claim which establishes the beginning of an individual benefit year. In most States it is merely a new claim filed by a claimant who meets the employment and wage qualifications for benefits. The Bureau recommends this definition of a valid claim under which a determination of insured status is made for any worker who files a new claim. This determination is administratively time consuming and should be started at once if it is to be available when needed for benefit payment. Provisions found in some State laws which require that the individual must meet other tests in addition to the monetary requirement before he can establish a benefit year are administratively undesirable. For example, such a provision would be one requiring that the worker complete a week of unemployment, that he be available for work, or that he be free from disqualification. Under any of these provisions, the agency must defer action on the monetary determination until the payment is nearly or already due or it must make many conditional monetary determinations that will never be used because, by the time claimants have met these various requirements, their base periods have changed.

Provisions for Starting a Second Benefit Year

With uniform periods, a potential new benefit year begins for all claimants receiving benefits at the turn of the benefit year. Eligible claimants can draw benefits in the second benefit year without interruption unless a waiting week is required (see page 56). With individual periods, a second benefit year does not begin until after the end of the claimant's last preceding benefit year--a year which ordinarily began with a period of unemployment. Claimants who exhaust their benefits must wait until the end of the benefit year before they can begin a new benefit year and draw benefits based on a new base period.

In States which cancel wage credits in certain disqualifying situations (see page 68), there may be instances in which a benefit year is established in which no benefits are payable because all wage credits have

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been cancelled. The Bureau recommends that in such instances the benefit year and base period be cancelled also. Then a new benefit year can be started as soon as the claimant has sufficient qualifying wages or employment. Such a provision serves a useful purpose in that it helps to mitigate the extremely punitive effect of setting up a period of 1 year in which all benefits are barred.

Request Wage Reporting

A small but increasing number of States have instituted a system of requesting wage reports from employers for claimants only after they file a claim. This system is termed "request wage reporting." This administrative change, eliminating the receipt of quarterly wage reports from employers, has had far-reaching effects on the benefit formula. It permits the reduction or elimination of the lag period between the base period and the benefit year, and eliminates the necessity of having a formula based on calendar quarters or a calendar year.

The States having this system of reporting use a base period ending either immediately before the benefit year, or within a short period prior to it. Some States end the base period with the end of the last calendar quarter preceding the benefit year (see Table 1, page A-2). Any one of these definitions of base period has the advantage of using more recent wage and employment data than would be available under a system of quarterly wage reports.

The impact of request wage reporting is also felt in other aspects of the benefit provisions, that is, the qualifying requirement and computation of benefits. In some benefit formulas these provisions are in terms of the claimant's weeks of employment in the base period (see page 44). Benefit formulas requiring data on weeks of employment are not confined to the States that use a request reporting system. However, it is easier to obtain data on weeks of employment under such a reporting system. A number of the "request reporting" States, but not all, have benefit formulas that use weeks-of-employment data.

Certain concepts have been commonly associated with request reporting systems but are not inherent in them. One of these is the "per employer determination" system used in several of the States that first adopted request reporting. Another is the punitive character of the disqualification provisions that generally accompanied adoption of the system. Still another is the postponement of the start of the benefit year until the claimant is free of disqualification. The Bureau considers these concepts undesirable and recommends that they be omitted. Although not inherent, the association of these concepts with request reporting is not merely coincidental. Under this system, it is easy to obtain and use separation information concerning employment that is remote from the current unemployment and its preceding separation from work. The receipt of a separate report from each employer at the time the claim is filed, showing both employment and separation information,

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tends to promote t' idea of relating the worker to [illegible] of his prior employers in turn as to his work record and the reas[illegible] for separation, rather than to his work record as a whole and to the reason for his current unemployment.

Experience with the system in several States has shown that it is feasible to obtain timely wage information under a request reporting system from the employers that are correctly listed by the claimant. Examination of employer records indicates that these reports are usually correct. While claimants can generally identify their base-period employers, it is more difficult for those who work for many employers in the course of a year--as, for instance, in the building trades. In these instances, failure to identify all base-period employers may frequently result in a loss of benefits, which would not occur under a system of quarterly wage reporting. With request reporting, such losses cannot be eliminated entirely, but the number may be reduced by competent claims interviewing.

In order to obtain accurate and timely reports and to reduce the delays in benefits caused by late reports, the law should provide: (1) That employers shall furnish each worker, upon separation, with a notice showing the employer's name, account number, and the address where employment and wage records are maintained, and advising the worker that he should keep such information because it will be needed when he files a claim for benefits; (2) That, if the employer fails to file timely reports, benefits shall be based upon the claimant's statement, supported by such information as may be reasonably required under the individual circumstances of the claimant, and that benefits paid on the basis of such statements, in the absence of fraud, shall not be subject to repayment on the basis of any redetermination based on later information; and (3) That employers who fail to file timely reports shall be subject to a money penalty for each report that is delinquent. In addition, the time limit for filing reports should be set so that there is sufficient time to receive the report and make the determination before benefits are due.

Summary

From time to time, changes are made in State provisions for base period and benefit year, for substantive or for administrative reasons. In making such changes, the Bureau recommends:

1. That the lag between the base period and benefit year be as short as possible, consistent with the benefit formula and with administrative feasibility.

2. That the definition of a valid claim to begin a benefit year not include requirements of unemployment, ability to work, availability for work, or freedom from disqualification.

[illegible]

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3. That an individual, rather than a uniform, benefit year be used.

4. That the benefit year and base period be limited to a year.

5. That under a formula using quarters for the base period the benefit year be a year period, rather than 52 weeks.

6. That, when a benefit year is established in which no benefits are payable because all wage credits have been cancelled (see page 68), the benefit year and base period be cancelled also.

7. That, in States using a system of request reporting, the law provide (a) that employers be required to furnish separated workers with written notices which show the employer's firm name, registration number, and reporting address; (b) that the time limit for employer reports be set so as to permit timely benefit payments; (c) that the agency be authorized to compute and pay benefits on the basis of information furnished by the claimant in cases where an employer's report is delayed beyond a specified time and that, in the absence of fraud, repayment of such benefits not be required; and (d) that a money penalty be required of employers who do not furnish wage and employment information promptly.

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No. 97-58

FILED
CLERK

In The

Supreme Court of the United States

October Term, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

The Seventh Circuit Court of Appeals has issued a clearly erroneous decision which requires the State of Illinois to refashion its system for determining eligibility for unemployment insurance benefits. Because the great majority of the states utilize substantially the same eligibility determination system that was overturned by the Seventh Circuit, the legality of their eligibility determinations systems is also in question. This will lead to unnecessary litigation in states and jurisdictions throughout the nation, litigation that has already begun in at least one such state.

In this case, the Court of Appeals affirmed a permanent injunction enjoining the application of an Illinois statute which prescribes the time period over which wage earnings will be counted for the purpose of determining eligibility for state unemployment insurance benefits (the "base period"). The Court of Appeals held that the Illinois statute is a "method[ ] of administration" within the meaning of section 303(a)(1) of the Social Security Act (the "Act") and, therefore, is subject to the Act's requirement that a state pay benefits "when due," rather than being an eligibility standard, which is not subject to this requirement. 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1) (1997). Under applicable federal regulations, the "when due" requirement has been interpreted to require full payment "with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a) (1996).

The Court of Appeals originally reached this decision in 1994. At that time, it remanded this case to District Court for factual findings and a determination as to

whether the Illinois base period statute did, in fact, comply with section 303(a)(1). The District Court was instructed to determine whether the Illinois statute "insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Pennington v. Didrickson*, 22 F.3d 1376, 1388 (7th Cir. 1994) ("*Pennington I*").

The District Court subsequently found that the Illinois statute did violate the "when due" clause of section 303(a)(1) and, therefore, enjoined the statute's application to the plaintiff class. (App. 67.)[1] That decision was appealed to the Seventh Circuit, which reaffirmed its holding in *Pennington I* and upheld the District Court's decision on remand based upon findings that it is administratively feasible to utilize an alternate base period ("ABP") which would result in the prompter payment of benefits than the existing Illinois base period. *Pennington v. Didrickson*, 110 F.3d 502, 508 (7th Cir. 1997) ("*Pennington II*").

Not only does the Seventh Circuit decision in *Pennington II* require the creation and implementation of a costly new base period system in Illinois, raising the possibility of similar requirements by courts in other states, it also leaves the door open for further challenges to all base period systems, including that of Illinois, anytime it can be shown that another base period system could be implemented which will result in an even prompter determination of eligibility.

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[1] All references to "App." refer to the Appendix to Illinois' Petition for Writ of Certiorari ("Petition").

As noted in Illinois' petition for writ of certiorari, at least forty-two other states and jurisdictions have base period statutes similar to the Illinois statute. (Petition, pp. 9-10, and n.4.) Those base period statutes were drafted in conformity with suggested legislation ("draft bills") that was prepared by the United States Department of Labor ("USDOL") to guide the states in crafting their individual unemployment statutes.

In reaching its decision, the Court of Appeals refused to defer to the construction of section 303(a)(1) of the Act by the USDOL, which presented its interpretation in an amicus brief indicating that base periods like that utilized by Illinois comply with the Act. That USDOL interpretation is consistent with its long-standing recognition of the exclusive right of the states to develop their own eligibility standards, which includes the sole right to define and utilize base periods.

Amici states now face the likely prospect of legal challenges because of the confusion and uncertainty created by the Seventh Circuit's decisions. In fact, such litigation has already been commenced in California, the state with the largest unemployment system. *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.) These legal challenges will impose substantial defense burdens on each amici state, since each will be forced to defend its particular base period and related wage information collection systems, should the Court of Appeals' decision in this case be followed in its jurisdiction.

Furthermore, if base period statutes in other jurisdictions are found to be subject to and out of compliance with section 303(a)(1), massive and costly restructuring of state unemployment wage information collection and

processing systems will likely be necessary.[2] For example, the District Court in *Pennington* found an ABP would result in up to $40 million per year in increased benefit payouts, $13.5 million in conversion costs and $2.6 million in additional annual expenses.[3] (App. 65.) Given that there are forty-two states with base periods like that of Illinois, the cumulative total cost impact will be a very substantial sum.[4]

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[2] The ultimate impact of the *Pennington* decision on state unemployment systems is a matter of special concern to states with larger systems, such as California which has the most claims filed of any of the states. A recent USDOL report of regular unemployment benefit claims filed over a 12-month period shows there were 3,243,297 initial claims filed in California. By comparison, Illinois had 687,746 claims filed and Arkansas had 226,703 during that same period. UI Data Summary, UIS, 1st Quarter CY97, USDOL, Unemployment Insurance Service, Division of Actuarial Services, May 1997.

[3] In California, estimates of the cost of converting the existing base period to an ABP which would count wages earned in the 52 weeks immediately preceding the filing of a claim, are $12.2 million in administrative costs and $92.7 million in increased benefit payments. (Cost estimate cited by plaintiffs and defendant in *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.). Cost estimates have also been prepared by the State of Arkansas, which estimates the administrative costs of an ABP to be as high as $12 million initially, plus $2 million annually, and increased benefit payments of up to $15.2 million. (Arkansas Employment Security Department, memorandum to governor dated May 29, 1996.)

[4] The fact that the major portion of the cost impact estimates for utilizing ABPs consists of increased benefit payments is a clear indication that base periods operate as eligibility standards.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred when it held that the Illinois base period statute, which clearly is identified and operates as an eligibility provision, is an "administrative method" and, therefore, subject to the prompt payment "when due" clause of section 303(a)(1). The Court of Appeals would not have reached this incorrect result had it deferred to the interpretations of the USDOL in this regard. As a result of the Court of Appeals' decision, unemployment benefit claimants in other states will be encouraged to pursue similar litigation in their states, which will place unnecessary burdens on those other states in defending their statutes, as well as heavy burdens on the trial and appellate courts.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO DEFER TO USDOL'S REASONABLE AND LONG-STANDING INTERPRETATION THAT BASE PERIODS ARE MATTERS FOR THE STATES TO DETERMINE AND ARE NOT METHODS OF ADMINISTRATION SUBJECT TO THE "WHEN DUE" CLAUSE OF THE SOCIAL SECURITY ACT

State unemployment insurance programs are operated cooperatively with the federal government, which provides federal funding to cover state administrative costs. *See, California Dept. of Human Resources v. Java*, 402 U.S. 121, 125 (1971); 42 U.S.C. § 502(a) (1997). Although Congress chose to regulate certain specified aspects of

unemployment insurance programs; the states were given broad latitude to develop their own unemployment compensation programs. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 537 (1979). This broad latitude is especially apparent with regard to the freedom of the states to develop their own eligibility criteria. *Id.* at 539. As stated by this Court:

> "We further noted that when Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area."

Id. at 537-538.

One of the areas that Congress chose to regulate concerns the "methods of administration" utilized by the states in administering their unemployment insurance programs. 42 U.S.C. § 503(a)(1). In this regard, section 303(a)(1) of the Social Security Act provides:

> "(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor . . . includes provision for –
>
> > "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . . "

The Secretary of Labor has interpreted this language as requiring "such methods of administration as will reasonable [*sic*] insure the full payment of unemployment

benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

It is undisputed that substantive state unemployment insurance eligibility requirements are not considered to be "methods of administration" and, therefore, are not subject to the "when due" clause. *See Pennington I*, 22 F.3d at 1381, n.4, and *Pennington II*, 110 F.3d at 504.

Section 500 of the Illinois unemployment insurance act provides:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that:
>
> "E. . . . he has been paid during his base period wages for insured work equal to not less than [the minimum amounts specified in the statute]. . . . "

820 ILCS 405/500E (1996).

Illinois defines "base period" as "the first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237 (1996). The "benefit year" begins on the first day of the week that a valid claim is filed. 820 ILCS 405/242 (1996). In accordance with the above, no earnings are considered from the fifth quarter, which is characterized as the "lag quarter," or the sixth quarter, the quarter in which the claimant files, in determining eligibility for benefits.

The existence of this lag quarter is the focus of respondents' complaint. *Pennington I*, 22 F.3d at 1379. Respondents contend that the presence of a lag period

operates to delay the payment of benefits to those claimants who initially lack sufficient earnings to qualify for benefits but would be eligible for benefits if their lag period earnings were counted. This could occur if they file a claim during a later quarter. (*Id.*)

In determining the applicability of section 303(a)(1) of the Social Security Act to the Illinois base period statute, the Court of Appeals held that the state's base period definition is an "administrative method" subject to the "when due" clause. *Pennington I*, 22 F.3d at 1388; *Pennington II*, 110 F.3d at 503. The court reached this holding despite the fact that the Illinois base period statute does not address the subject of *when* benefits must be paid. The court failed to accept the fact that the base period statute is intended to be, and operates as, a substantive standard for determining eligibility for benefits, i.e., a standard for determining *whether* benefits are payable.

In reaching its holding, the Court of Appeals considered, but rejected, the contrary position of the USDOL which appeared as amicus curiae below, in support of Illinois. In its amicus brief, the USDOL took the position that the Illinois base period standard is a legitimate eligibility requirement that defines what earnings will be considered in determining whether benefits are due. Brief For The United States of America As Amicus Curiae Supporting the Appellee, before the U.S. Court of Appeals for the Seventh Circuit, May 14, 1992, pp. 7, 16. The USDOL noted that it has repeatedly indicated that base periods like that used by Illinois meet federal requirements. *Id.* at 13.

By failing to defer to the position of the agency which administers the provisions of the Social Security Act relating to unemployment compensation, on a matter not specifically addressed in the Act, the Court of Appeals failed to adhere to well-established precedent of this Court. That precedent holds that a court should defer to reasonable interpretations of a federal statute by an agency that administers the statute, provided that the statute is ambiguous or does not address the specific matter at issue and, provided further, that the agency's interpretations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 414 (1992); *Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 912 (1997).

The Court of Appeals characterized the USDOL's interpretations of section 303(a)(1) as " 'agency litigating positions,' " not entitled to deference when they are " 'unsupported by regulations, rulings or administrative practice.' " *Pennington I*, 22 F.3d at 1383; *quoting* from *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The Court of Appeals placed great emphasis on what it considered to be a lack of "formal regulations" reflecting the USDOL's interpretations. *Pennington I*, at 1383-1384. The court also emphasized that there is no formal USDOL regulation directly stating that "the length of lag periods is a matter of eligibility within the exclusive authority of the states." *Id.* at 1383.[5]

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[5] However, the existence of formal regulations is not the only basis for judicial deference. As noted in the quoted excerpt

The standard for deference applied in this instance by the Court of Appeals is too narrow; it does not conform with the standards specified in the above-cited decisions of this Court. Specifically, the Court of Appeals' action directly conflicts with the recent decision of this Court in *Auer v. Robbins*, which held that a USDOL construction of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 et seq., presented by way of amicus brief, was fully entitled to deference. *Auer v. Robbins*, 117 S.Ct. at 911-912. This Court noted that just because the interpretation was received by way of a legal brief did not in any sense make it unworthy of deference, as a "post hoc rationalization." *Id.* at 912, citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. at 212. This Court noted that "[t]here is simp[illegible] no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 117 S.Ct. at 912.

Here, not only is there no reason to suspect the USDOL's interpretation, that interpretation is consistent

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from *Bowen*, judicial deference is also appropriate if the agency interpretation is supported by "rulings, or agency practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212.

Furthermore, there is no reason for the USDOL to adopt a regulation indicating that it does not regulate the length of state lag periods because they are not methods of administration. Since neither Congress nor the USDOL comprehensively regulate state unemployment insurance programs there is no need for the USDOL to spell out those areas it does not regulate. Instead, the USDOL's regulations specify certain standards and restrictions in those limited areas where it does have authority to regulate.

with USDOL regulations and its long-standing interpretations relating to base periods. In this regard, the USDOL has adopted regulations which expressly implement the provisions of section 303(a)(1) of the Act regarding "methods of administration" and the "when due" clause. *See* 20 C.F.R parts 640 and 650 (1996).

Part 640 of the USDOL regulations sets out specific time standards for prompt payment of unemployment benefits by the states. 20 C.F.R § 640.5 (1996). Part 650 prescribes specific time periods for prompt state administrative hearing and decision processes relating to benefit appeals. 20 C.F.R § 650.4 (1996). These implementing regulations single out the states' procedures for the payment of benefits and for appeals as "methods of administration" referred to in section 303(a)(1) of the Act. The regulations are designed to insure the prompt payment of unemployment benefits, including the prompt determination of eligibility, "when determined under the State law to be due." 20 C.F.R. § 640.1(a)(1), (2) (1996). Nowhere in USDOL regulations are base period standards identified as "methods of administration" governed by the USDOL regulations.[6]

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[6] With regard to the issue of promptness of payment, the regulations note:

> "Accordingly, implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility. However, applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law."

20 C.F.R. § 640.1(b).

Thus, the regulations expressly recognize that although the USDOL may regulate state *procedures* for paying benefits and

Additionally, in several places in its regulations USDOL expressly recognizes that state law, not federal law or regulation, determines applicable base periods. *See*, 20 C.F.R. §§ 609.2(c), 609.3(a) (1996) (unemployed federal civilian employees are subject to base periods defined by state law); 20 C.F.R. §§ 614.2(c), 614.3(a) (1996) (same rule for unemployed individuals separated from the Armed Forces); and 20 C.F.R. § 615.2(b) (1996) (base period for purposes of receiving extended benefits is determined under state law).

In addition to the above formal rules, 60 years ago the USDOL issued policy interpretations relating specifically to base periods. These interpretations are reflected in "draft bills" for suggested state unemployment compensation laws, issued by the USDOL in 1937. In the draft bills, the USDOL placed a base period standard in the section containing *suggested eligibility* criteria. That particular base period standard provides for a lag quarter just like that used in the Illinois statute. Social Security Board, Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, revised edition, January 1937, § 4(e).[7] Nevertheless, the

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determining eligibility, it may not regulate in an area which encroaches upon the permissible content of specific eligibility criteria. Such encroachment clearly occurred in this case, where the Seventh Circuit held that the length of state base periods is subject to the "when due" clause.

[7] The draft bill notes that it is "merely suggestive" and "is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each State to determine for itself just what type of legislation it

Court of Appeals disregarded these interpretations by the USDOL because it considered them to be ambiguous, noting that they were not adopted as formal regulations. *Pennington I*, 22 F.3d at 1384.

The Court of Appeals should have deferred to the USDOL's reasonable interpretation of section 303(a)(1), as reflected in its amicus brief below. Not only is the USDOL's interpretation clearly stated in its amicus brief, that position is also reflected in the USDOL's existing

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desires." The draft bill provides as follows regarding base periods:

> "Benefit Eligibility Conditions
>
> "Sec. 4 An unemployed individual shall be eligible to receive benefits with respect to any week only if the commissioner finds that
>
> " . . . . . .
>
> "(e) He has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages for employment by employers equal to not less than sixteen times his weekly benefit amount."

Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, pp. 1, 19, 20 (1937).

(An errata sheet for the draft bills changed the above to read "the first *three* out of the last *four* completed calendar quarters . . . ," without changing the concept of a "lag" quarter.)

The original California base period statute, adopted in 1939, tracks the draft bill:

> "Sec 52.2 The term 'base period' means the first four out of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year."

Stats. Cal., c. 674, § 52.2, p. 2148 (1939).

regulations and the long-standing interpretations contained in its draft bills. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Those regulations and draft bills clearly show that the USDOL considers base periods to be eligibility criteria and, therefore, not subject to the "when due" clause of section 303(a)(1). There is no ambiguity with regard to the USDOL's position in this respect.[8]

II

IF THE ERRONEOUS DECISION BELOW IS ALLOWED TO STAND WITHOUT REVIEW BY THIS COURT, IT WILL BREED A MULTIPLICITY OF UNNECESSARY LITIGATION

Given that there are at least forty-two other states and jurisdictions with base period statutes similar to that of Illinois, there is a significant likelihood that a multitude of lawsuits will be filed in other states, prompted by the Seventh Circuit's decisions in *Pennington I* and *II*. As previously noted, such litigation has already begun in California.[9] *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL

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[8] This fact is made abundantly clear in the recent testimony before Congress of the Deputy Assistant Secretary for the USDOL, Mr. Raymond Uhalde. Mr. Uhalde testified that the USDOL current and historic position is that the right to determine base periods is "an eligibility issue, a determination of the States." *See, Unemployment Insurance Issues, Hearings Before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 104th Cong., 2nd Sess., pp. 6, 27-28 (July 11, 1996) (statement of Raymond Uhalde, Dep. Asst. Secty. USDOL).

[9] California defines its base period in the following manner:

> § 1275. "Unemployment compensation benefit award computations shall be based on wages paid in

(N.D. Cal.) It will conserve precious judicial resources to have the base period issue resolved by this Court now, rather than forcing its resolution by the other circuit courts of appeals on a case by case basis.

Resolution of the issue by this Court will also ensure harmony among the circuits in this area of the law. Although amici states believe that the Seventh Circuit clearly misconstrued the application of section 303(a)(1), some district and circuit courts considering the issue may follow the Seventh Circuit's lead. The probability of such an outcome is significant given the likelihood of a multitude of legal challenges in jurisdictions and states throughout the nation.

In those trial and appellate courts that follow the holding of the Seventh Circuit that the "when due" clause applies to base periods standards, the states will be forced to justify any perceived time delays caused by lag periods in their base period statutes. This will impose severe defense burdens upon the states, since the issue of whether a base period is in compliance with the "when

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> the base period. 'Base period' means: for benefit years beginning in November, December, or January, the four calendar quarters ended in the next preceding month of June; for benefit years beginning in February, March, or April, the four calendar quarters ended in the next preceding month of September; for benefit years beginning in May, June, or July, the four calendar quarters ended in the next preceding month of December; for benefit years beginning in August, September, or October, the four calendar quarters ended with the next preceding month of March. . . . "

Cal. Unemp. Ins. Code § 1275 (West 1986).

due" standard is factually very complex and full of uncertainties, especially given its relationship to each state's capacity to collect and process wage data. The compliance issue will be determined based upon the standard of section 640.3(a), that payments be made "with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Furthermore, if a state base period standard is determined to be out of compliance with the "when due" clause, additional difficulties will occur in determining what modifications to state unemployment systems will be necessary, how those modifications will be implemented and at what cost. The complexity of the problem is illustrated by the lengthy factual findings that were made by the District Court on remand from *Pennington I*. (App. 44-60.)

Further complicating matters is the fact that even if a state loses litigation on the base period issue and, therefore, revamps its base period system, that system is still open to additional challenge anytime a potential plaintiff believes that a state's base period could be further modified to pay benefits sooner. The cases filed to date present a good example of this danger. In the pending California litigation, plaintiffs seek to have an ABP that would include wages for the period ending as late as one week before a claim is filed. Specifically, the plaintiffs therein have proposed an ABP consisting of the fifty-two weeks immediately preceding the filing of a claim. *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.), Complaint For Injunctive And Declaratory Relief, filed Jan. 15, 1997.

In *Pennington*, the two ABPs proposed by plaintiffs would include lag quarter wages in a modified Illinois

base period, but would still not count wages earned in the filing quarter. (App. 54.) Thus, even if so modified the Illinois base period system would still be open to future legal challenges by plaintiffs seeking to include filing quarter earnings, such as the plaintiffs in California.

Finally, the Court of Appeals suggests that the USDOL can always "issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations." *Pennington I*, 22 F.3d at 1388, n.9. However, such action is highly unlikely given that the USDOL is not bound by the Court of Appeals' decision and the USDOL has taken the position that base periods are not subject to the "when due" clause. The likely result will be that the courts in different states will be forced to determine what is administratively feasible in base period criteria to achieve prompt payment. That will likely yield varying results among the states.

In contrast, if this Court were to rule on the application of the "when due" clause to base periods standards, the result will either be maintenance of the status quo if *Pennington* is reversed or, if the opposite occurs, adoption of a uniform standard for all the states. Thus, if this Court were to find that the "when due" clause does apply to base periods standards, it is very likely that the USDOL would in that event adopt base period regulations for all the states. This is exactly what happened after this Court issued its decision in *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971).[10] See 20 C.F.R. § 650.1(a).

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[10] *Java* is discussed on page 13 of the Petition.

Therefore, it will conserve judicial resources, promote harmony among the circuits, and protect the states from unnecessary and costly litigation if this Court accepts this case for review.

CONCLUSION

Resolution by this Court of the question of whether Illinois' base period standard is a method of administration or an eligibility criterion is of immediate and vital importance to each of the amici states and to virtually every other state in the Union. Amici urge the Court to grant Illinois' petition.

Dated: August 7, 1997

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 97-58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, the Petitioner, Lynn Doherty, Director of the Illinois Department of Employment Security ("IDES"), brings to the attention of the Court legislation enacted after the July 3, 1997 filing of her petition (docketed July 8, 1997).

A. New Legislation

On August 5, 1997, H.R. 2015 (the "Balanced Budget Act of 1997") was signed into law as Public Law 105-33, 111 Stat. 251. As relevant to this case, the legislation provides:

> **Subtitle E—Unemployment Compensation**
>
> **SEC. 5401. CLARIFYING PROVISION RELATING TO BASE PERIODS**
>
> (a) IN GENERAL.—No provision of a State law under which the base period for such State is defined or otherwise determined shall, for purposes of section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)), be considered a provision for a method of administration.
>
> (b) DEFINITIONS.—For purposes of this section, the terms "State law", "base period", and "State" shall have the meanings given them under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).
>
> (c) EFFECTIVE DATE.—This section shall apply for purposes of any period beginning before, on, or after the date of the enactment of this Act.

Pub. L. No. 105-33, 111 Stat. 251, Title V, Subtitle E, § 5401 (Aug. 5, 1997).

Pursuant to this new legal standard, state statutory "base periods", determining entitlement to unemployment insurance benefits, are not methods of administration for purposes of section 303(a)(1) of the Social Security Act ("Act"), which is the "when due" clause (42 U.S.C. § 503(a)(1)). Further, the law applies to "any period beginning before, on, or after" the legislation's August 5, 1997 effective date.

B. Relevance And Application To The Present Case

As discussed in the pending petition (Petition at 3-8), in 1994, the Court of Appeals held in *Pennington I* that Illinois' base period was a method of administration subject to section 303(a)(1) of the Act. *Pennington v. Didrickson,* 22 F.3d 1376 (7th Cir. 1994) (App. 16). In the 1997 *Pennington II* decision, the Court of Appeals affirmed the district court's decision on remand, which found the base period violated the when due clause and enjoined its use with respect to the plaintiff class. *Pennington v. Doherty,* 100 F.3d 502 (7th Cir. 1997) (App. 1).[1]

Under the new legislation, base periods are not deemed methods of administration, contrary to the *Pennington I* holding; as a result, such periods also cannot be subject to the Act's when due clause requirements. The Petitioner submits that this new law must be applied to reverse *Pennington I* and *Pennington II.*

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[1] The pending petition raised, and this Court has jurisdiction over, the question of law raised in *Pennington I,* namely, whether a base period is a state eligibility criterion or a method of administration. *See Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964) (questions raised in first and second appeals properly before this Court).

The relief afforded by the lower courts was an injunction against IDES' application of the base period to the plaintiff class. Relief by injunction however, operates "*in futuro*" and the plaintiff class has no "vested right" in the injunction while it is subject to review. *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 201 (1921) (cited and quoted in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483, 1501 (1994)). Accordingly, where legislation governing the propriety of the injunction is enacted while the judgment is pending on appeal, the court of review is obliged to apply the new statute. *Landgraf,* 114 S. Ct. at 1501; *American Steel,* 257 U.S. at 201. *See also Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 15 L. Ed. 435, 436-37 (1856) (where Act declared a bridge to be lawful, after this Court adjudicated it an obstruction, injunctive aspect of the decree cannot be enforced). Thus, here, the injunction must fail in light of the new legislation.

Application of the intervening legislation in cases like this is not retroactive. *Landgraf,* 114 S. Ct. at 1501. Even to the extent the new law might be argued to have some retroactive effect, however, it would still meet the standards for applying the law in effect at the time of review. While this Court has recognized a tension between application of the current law and the presumption against retroactivity, it has found no conflict between these principles when congressional intent for retroactive application is clear. *See Landgraf,* 114 S. Ct. at 1501; *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 836-37 (1990). Requiring the clear intent of Congress assures that it has affirmatively considered and accepted the effect of retroactive application. *Landgraf,* 114 S. Ct. at 1501.

In *United States v. Schooner Peggy,* 1 Cranch 103, 2 L. Ed. 49, 50 (1801), new legislation applied to property "not yet definitely condemned" and therefore to the Schooner Peggy on appeal. The *Schooner Peggy* Court announced the principle that "if, subsequent to judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 2 L. Ed. at 51. "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id. See also Landgraf,* 114 S. Ct. at 1501 (citing *Schooner Peggy* as authority for applying new, retroactive legislation to cases pending on appeal).

In the recently enacted legislation, Congress evidenced its clear intent to make section 5401 apply to "any period beginning before, on, or after" the enactment of what became Pub. L. No. 105-33. Plainly, Congress intended its legislation to reach and affect all unemployment claims, whether filed before, on or after the enactment of section 5401. Assuming the legislation were considered retroactive, the Court of Appeals' judgment still could not stand.

In light of this intervening legislation, this Court may wish to consider summary reversal pursuant to Supreme Court Rule 16.1. In the alternative, the Petitioner requests that this Court grant the petition for writ of certiorari, vacate the judgment of the Court of Appeals, and remand the case for further consideration in light of Title V, Subtitle E, section 5401 of Pub. L. No. 105-33. *See Bureau of Economic Analysis, United States Dep't of Commerce v. Long,* 454 U.S. 934 (1981).

CONCLUSION

For these additional reasons and for those presented in the petition, the Director of the Illinois Department of Employment Security respectfully asks this Court to grant a writ of certiorari and summarily reverse the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, or accept the judgment for review by this Court, or vacate the judgment and remand this case to the Court of Appeals for further consideration.

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